APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA, DECIDED JUNE 26, 1998

EXXEL/ATMOS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

United Steelworkers of America, Intervenor.

Nos. 97-1417 and 97-1418.

United States Court of Appeals,

District of Columbia Circuit.

Argued April 9, 1998.

Decided June 26, 1998.

Rehearing Denied Aug. 26, 1998.

Employer petitioned for review and National Labor Relations Board (NLRB) cross petitioned for enforcement of orders issued in ongoing proceedings. The Court of Appeals, Randolph, Circuit Judge, held that: (1) the employer's president's speech about the procedures for decertifying the union was not coercive, nor did it promise any benefit, and, thus, the speech did not amount to an unfair labor practice,

even though the employer and president may have hoped that the employees would act on the information; (2) a Christmas bonus was not an element of "wages" and was not subject to collective bargaining; and (3) the employer's knowledge that some of its employees were seeking decertification did not excuse its failure to comply with an order directing it to bargain with the union where no decertification petition had been filed when the employer canceled all planned bargaining sessions with the union and where employer did not have clear evidence that a majority of its employees favored decertification.

Petition for review granted in part and denied in part; enforcement granted in part,

Sentelle, Circuit Judge, filed a concurring opinion.

See also, 28 F.3d 1243.

Vincent J. Apruzzese argued the cause and filed the briefs for petitioner.

David A. Fleischer, Senior Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Linda Sher, Associate General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel. Margaret A. Gaines, Supervisory Attorney, entered an appearance.

Daniel M. Kovalik argued the cause for intervenor United Steelworkers of America. With him on the brief were Laurence Gold, David Silberman, and James Coppess.

Appendix A

Before: WALD, SENTELLE, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

Concurring opinion filed by Circuit Judge SENTELLE.

RANDOLPH, Circuit Judge:

These are petitions by Exxel/Atmos, Inc. to review, and cross-petitions by the National Labor Relations Board to enforce, two orders issued in June 1997. The Board issued the first of its orders on remand from our decision in Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C.Cir.1994). The second order dealt with events in late 1994 and early 1995, after the remand.

Exxel is a small New Jersey company manufacturing nongas aerosol delivery systems. In September 1990 the company voluntarily recognized the United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its production and maintenance employees. Nine months later, in May 1991, Exxel refused the union's request to bargain. The Board found that Exxel had thereby violated § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (5). See Exxel-Atmos, Inc. ("Exxel I"), 309 N.L.R.B. 1024, 1024, 1992 WL 390103 (1992). Among other things, it ordered Exxel to cease and desist from refusing to bargain with the union and affirmatively "to recognize, meet and bargain collectively in good faith" with the union upon request. Id. at 1024, 1033, 1992 WL 390103. This court upheld the Board's findings of violations of the Act and enforced the cease and desist order, but--on the basis of longstanding precedent in this circuit--we refused to enforce the bargaining order and

remanded the case to the Board for a "clear explanation" of "why a bargaining order, as opposed to the cease and desist order standing alone, was justified in this case." Exxel/Atmos, 28 F.3d at 1248-49; see Exxel/Atmos, Inc. v. NLRB, 37 F.3d 1538 (D.C.Cir.1994) (enforcing Board's order in part and remanding case in part).

The Board responded by reaffirming the bargaining order in a June 1997 supplemental decision. See Exxel-Atmos, Inc., 323 N.L.R.B. No. 159, 1997 WL 309321 (June 5, 1997). On the same date, the Board issued another decision and order finding the company guilty of additional unfair labor practices. On December 7, 1994, after our remand, Ronald Lemke, Exxel's President, gave a speech to the production and maintenance employees in which he explained the procedure for decertifying the union and informed the employees that Exxel was obligated to bargain with the union unless it was decertified. Exxel also gave each of its employees a cash Christmas bonus of $100 during the week of December 23. On January 10, Exxel, pointing to signed letters to the Board from some employees indicating that they no longer wished to be represented by the union, canceled all bargaining sessions with the union, then scheduled for early 1995. Employees filed a decertification petition on January 26, and thereafter Exxel took the position that it was under no obligation to bargain until a decertification election had been held. The Board concluded that Lemke's speech, the Christmas bonus, and Exxel's refusal to bargain violated § 8(a)(1) and (5) of the Act. See Exxel-Atmos, Inc. ("Exxel II"), 323 N.L.R.B. No. 158, slip op. at 3, 1997 WL 309318 (June 5, 1997). As a remedy, the Board again, inter alia, ordered Exxel both to cease and desist from refusing to bargain and affirmatively to bargain with the union upon request. See id.

Appendix A

I

We shall deal first with the Board's decision in Exxel II, and Lemke's speech. Employer speech or conduct violates § 8(a)(1) if it "interfere[s] with, restrain[s], or coerce[s] employees" in their decision whether to decertify the union. 29 U.S.C. § 158(a)(1). On the other hand, the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

The Board's explanation for finding a § 8(a)(1) violation in Lemke's speech consists of the following (323 N.L.R.B. No. 158, slip op. at 2, 1997 WL 309318):

> In his unsolicited speech, the Respondent's president, Lemke, provided the unit employees with instructions on how to decertify the Union. In doing so, the Respondent unlawfully instigated the decertification petition among its employees in violation of Section 8(a)(1) of the Act.*

The text tells us nothing. It merely recites the Board's conclusion that the speech was "unlawful." The Board's rationale, therefore, must be contained in the footnote suggesting that Lemke's speech was indistinguishable from the employer conduct condemned in Weisser Optical and "the cases cited therein."

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* Weisser Optical Co., 274 NLRB 961, 1985 WL 45835 (1985), and cases cited therein.

In Weisser Optical, the Board found a § 8(a)(1) violation because the company provided more than "ministerial aid" to its employees in filing a decertification petition. A company official had asked an employee to initiate and solicit signatures for a decertification petition among the rank-and-file, "explaining that he wanted to rid the [company] of the Union." 274 N.L.R.B. at 961, 1985 WL 45835. When the employee agreed, the official gave him a booklet containing instructions and sample language to be used in gathering evidence of employee interest. See id. The employee then apparently abandoned the idea, so management approached a second employee "about getting something started." Id. (internal quotation marks omitted). After a meeting at which the company expressed its belief that no "third party" was needed to work out any differences the employees might have with the company, the first employee immediately began soliciting signatures for a decertification petition. See id. The petition arrived at the Board only a few days later. See id. Such "unsolicited involvement with the showing of interest petition," held the Board, "constituted far more than ministerial aid" and hence violated § 8(a)(1) of the Act.

The "cases cited therein," in Weisser Optical that is, turn out to be only one case--Silver Spur Casino, 270 N.L.R.B. 1067, 1984 WL 36495 (1984).[1] There, the employer had suggested to

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1. Weisser Optical also contained citations to Texas Elec. Coop., 197 N.L.R.B. 10, 1972 WL 4491 (1972), and Craftool Mfg. Co., 229 N.L.R.B. 634, 1977 WL 8653 (1977). The Board cited those cases, however, not to explain when an employer violates § 8(a)(1) by assisting employees in filing a decertification petition, but rather to support its statement that reliance on a tainted decertification petition is no defense to a withdrawal-of-recognition charge. See Weisser Optical, 274 N.L.R.B. at 962, 1985 WL 45835.

an employee--at work and in phone calls to her at her home--that a decertification petition ought to circulate among the employees. See id. at 1071-72, 1984 WL 36495. The employer provided her with language to use in the petition, approved a draft, told the employee how to circulate it and among whom, gave her instructions on getting it signed and dated, and told her where to send it. See id. When a different employee approached the employer with concerns about a union, the employer provided similar assistance for a second petition. See id. at 1072, 1984 WL 36495. The employer then mailed both petitions to the Board. See id. The ALJ held that the employer's actions violated § 8(a)(1) because they "constitute[d] far more than the mere ministerial aid such as the Board might not find unlawful." Id. The Board upheld the ALJ's conclusion, stating that the employer "unlawfully encouraged and assisted the employees in repudiating the Union." Id. at 1067, 1984 WL 36495.

Neither Weisser Optical nor Silver Spur help to explain the Board's conclusion in this case. Whatever the precise meaning of "ministerial aid," neither decision goes so far as to hold that an employer violates § 8(a)(1) merely through statements informing employees of the decertification process. The Board explicitly rejected such a reading of § 8(a)(1) in Lee Lumber & Bldg. Material Corp., 306 N.L.R.B. 408, 1992 WL 41348 (1992). The employer there had called a meeting and pointed out the disadvantages of switching to a union-proposed pension plan. See id. at 408, 1992 WL 41348. In response to employee questions about how to get rid of the union, the employer gave the employees general information about the decertification process and the location of the Board's office, adding that any decertification petition "would have to be filed soon." Id. The Board thought the employer's

statements caused concern among the employees and triggered the filing of a decertification petition. See id. at 410, 1992 WL 41348. Even so, it held that this did not make the statements unlawful under § 8(a)(1). "It is clear that, under Section 8(c), an employer may lawfully furnish accurate information ... if it does so without making threats or promises of benefits.... Otherwise lawful statements do not become unlawful ... [under § 8(a)(1)] merely because they have the effect (intended or otherwise) of causing employees to abandon their support for a union." Id. at 409-10, 1992 WL 41348 (footnotes omitted). The employer's motive and the actual effect of its statements are irrelevant. See id. at 409, 1992 WL 41348. Instead, "the test is whether the employer's statements may reasonably be said to have tended to interfere with employees' exercise of their Section 7 rights." Id. (footnote omitted); see also Lucky 7 Limousine, 312 N.L.R.B. 770, 804, 1993 WL 402901 (1993).

Lemke's speech did not offend this standard. Lemke, and hence Exxel, doubtless intended to do more than merely make a public service announcement. It is fair to assume they hoped the employees would act on the information. But Lee Lumber makes the motivation of the employer irrelevant. As to the content of the speech, the part with which the Board took issue simply informed Exxel's employees that a decertification procedure existed for employees who decided they no longer wanted to be represented by a union.[2] For all we know, the

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2. The Board focused on the following portion of Lemke's speech:

> What if we don't want a union? Is there anything we can do about it? Yes. The Labor Board has a procedure called a Decertification Election. This would allow the employees to vote, in a secret ballot election, on whether you truly

(Cont'd)

employees were already aware of this. After briefly (and accurately) explaining the procedure, Lemke said that anybody "who wants more information ... can call the Labor Board to get more details about how to file for [a decertification] election." J.A. 61. He also left copies of the Board's address and phone number in the meeting room. Before concluding, Lemke told the employees, "The decision about whether to file a petition with the Labor Board for a Decertification Election is entirely up to you. The Company will not take any action against anyone because he has or has not signed a petition." J.A. 61. We presume the Board saw something coercive or threatening in these statements, but we are unable to detect anything of the sort. Unlike the employers in Weisser Optical and Silver Spur, who arguably pressured individual employees to participate in the decertification process, Lemke delivered his speech to Exxel's employees collectively. Moreover, his statements were remarkably similar to those in Lee Lumber, doubtless because an attorney for the company wrote the speech.

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> want the union to represent you. The Board will conduct a Decertification Election if 30% of the employees take or send a petition to the Labor Board stating that they do not want the union to represent them. Anybody who wants more information about this procedure can call the Labor Board to get more details about how to file for an election. I will leave copies of the Labor Board's address and telephone number here in this room. I want to say as clearly as I possibly can that the Company intends to comply with the law and with the court's order [in Exxel I]. The decision about whether to file a petition with the Labor Board for a Decertification Election is entirely up to you. The Company will not take any action against anyone because he has or has not signed a petition. J.A. 61.

Short of saying nothing at all, it is hard to see how Lemke could have been more careful about not interfering with the employees' free choice and yet still informed them of the availability of the decertification procedure.

At any rate, since the Board chose not to explain why it believed the speech constituted "unlawful instigation," its citation to a clearly distinguishable precedent is not enough to warrant sustaining its conclusion that Exxel violated § 8(a)(1).

II

On the Wednesday or Thursday before Christmas 1994, each employee received from Exxel a $100 bill contained in a greeting card signed by Exxel's management. The Board, pointing out that the " 'Christmas bonus' was related to the increased sales performance of [Exxel's] employees in 1994," found that the bonus "constitutes wages, and as such, is a proper subject for collective bargaining." Exxel-Atmos, 323 N.L.R.B. No. 158, slip op. at 3, 1997 WL 309318. Exxel did not bargain with the union before awarding the bonus and so the Board concluded that the company violated § 8(a)(1) and (5). See id.[3]

The Board's conclusion lacks substantial evidence. The Act requires employers to bargain collectively with unions over

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3. Notably, the Board did not rest its conclusion that the Act was violated on a finding that Exxel presented the bonus with the intent of demonstrating to its employees "that the Union was irrelevant," or as part of a "concerted strategy to weaken and discredit the union in the eyes of the employees." Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 253 (D.C.Cir.1991) (citation and quotation marks omitted). Such a finding would be subject to a very different analysis.

"wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). A "Christmas bonus ... becomes an element of wages and, therefore, a term and condition of employment that cannot be altered unilaterally" if it is "tied to other remuneration and paid regularly over an extended period." International Bhd. of Elec. Workers Local 1466 v. NLRB, 795 F.2d 150, 153 (D.C.Cir.1986). The bonus here was not tied to the wages of the employees. It was linked neither to seniority nor to each employee's individual performance. And, perhaps most telling, there is no evidence that Exxel had ever paid such a bonus to its employees in the past. See id. (Christmas bonus found to be "a part of the employees' wages" where it was "a regular practice going back some forty years"); 5 THEODORE KHEEL, LABOR LAW § 19.04, at 19-18 to -19 (1997) (cases finding bonuses to be wages "have primarily relied on the regularity of the payment over a sufficient period of time"); Sykel Enters., Inc., 324 N.L.R.B. No. 171, slip op. at 3-4, 1997 WL 704931 (Nov. 7, 1997) (crucial question in determining whether Christmas bonus constitutes wages is whether employer's pattern of paying bonus in past has justified employees' expectations that they could count on receiving it as part of wages in future as well).

In short, the record plainly shows that the bonus was a seasonal gift. The previous Christmas, Exxel had hosted a buffet luncheon party for its employees. The next year it gave them cash because it was the first year Exxel had turned a profit. That did not transform the $100 bonus into "an integral part of [Exxel's] wage structure." Niles-Bement-Pond Co., 97 N.L.R.B. 165, 166-67 (1951).

Appendix A

III

This brings us to Exxel's refusal to bargain with the union in early 1995. In enforcing the Board's cease and desist order in Exxel I, we ordered Exxel to "[c]ease and desist from ... [w]ithdrawing recognition from and refusing to meet and bargain collectively with" the union. Exxel/Atmos, Inc. v. NLRB, 37 F.3d 1538 (D.C.Cir.1994) (enforcing Board's order in part and remanding case in part). It was "utterly clear" that our order put Exxel under an affirmative obligation to bargain with the union as of November 30, 1994, the date our mandate issued. Caterair Int'l v. NLRB, 22 F.3d 1114, 1123 (D.C.Cir.1994).[4] Even so, Exxel did next to nothing. It held no bargaining sessions with the union in the weeks leading up to January 10. And when on that date Exxel learned of an impending decertification effort on the part of some of its employees--it is unclear whether Exxel knew exactly how many employees supported the effort, but it is clear that no decertification petition had been filed at that time--it promptly canceled all planned bargaining sessions with the union, including one scheduled for the next day. We acknowledge that under some circumstances an employer may suspend bargaining if it "can show, by 'clear, cogent and convincing' evidence, either that the union has lost majority support or that the employer has a reasonable, goodfaith doubt of continuing majority support." Microimage Display Div. of Xidex Corp.

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4. An affirmative bargaining order and an order requiring an employer to "cease and desist" from refusing to bargain do not have the same consequences. Under settled Board practice, only the former carries with it a decertification bar, preventing the employer from challenging the union's majority status for a reasonable period of time. See, e.g., Exxel/Atmos, 28 F.3d at 1248; Caterair, 22 F.3d at 1121-22 & n. 4.

v. NLRB, 924 F.2d 245, 253 (D.C.Cir.1991) (citation omitted). We also recognize that Exxel twice requested by letter, once on January 10 and again on January 30, that the Board inform it whether a majority of Exxel's employees had petitioned for decertification, and that the Board refused the request. But none of this excused Exxel from complying with our order. Exxel should have bargained with the union as soon as was practically possible following the issuance of our mandate. At the very least, it should have gone ahead with the scheduled bargaining sessions until January 26, when a formal decertification petition was filed. See, e.g., St. Agnes Med. Ctr. v. NLRB, 871 F.2d 137, 146 (D.C.Cir.1989); Allied Indus. Workers, Local Union No. 289 v. NLRB, 476 F.2d 868, 881 (D.C.Cir.1973); NLRB v. New Assocs., 35 F.3d 828, 833-35 (3d Cir.1994). Exxel's refusal to do so constituted a direct violation of our order and hence was clearly unlawful.

As a remedy for Exxel's recalcitrance, the Board once again issued a bargaining order. Relying on our decision in Exxel I, the company argues that the Board failed to justify the bargaining order. But there is an essential difference between the two cases: here, Exxel never contested the propriety of the bargaining order in the proceedings before the Board. Accordingly, under § 10(e) of the Act, Exxel waived any right it had to object to the order before this court. See 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board ... shall be considered by the court...."); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 666, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982) (failure to "object[ ] to the Board's decision in a petition for reconsideration or rehearing ... prevents consideration of the question by the courts"); Quazite v. NLRB, 87 F.3d 493, 497-98 (D.C.Cir.1996) (refusing to consider employer's argument that Board did not adequately explain

need for bargaining order because employer did not raise objection before Board). It is of no moment that the Board neglected to invoke § 10(e) in its brief to this court. Section 10(e) "speaks to courts, not parties," and the Board cannot waive its jurisdictional requirements simply by neglecting to mention them before us. EEOC v. FLRA, 476 U.S. 19, 23, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) (per curiam).[5]

The petition for review in No. 97-1417 is granted in part and denied in part. Enforcement of the Board's order is denied on the speech and bonus questions in No. 97-1417. The remainder of the Board's order in No. 97-1417 is enforced. The petition for review in No. 97-1418, and the Board's cross-application for enforcement, are dismissed. See note 5, supra.

So ordered.

SENTELLE, Circuit Judge, concurring:

I join without reservation in the Court's conclusion that under section 10(e) of the Act, 29 U.S.C. § 160(e), we lack jurisdiction to review the second bargaining order. I write separately to express my hope (probably a vain one) that the Board will not find in our declining any suggestion that we consider the reasoning in its supplemental opinion adequate to

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5. Because we enforce the Board's June 5, 1997, bargaining order in Exxel II, there is no need for us to consider whether the Board's supplemental opinion adequately supported the original bargaining order issued by the Board in Exxel I. The two bargaining orders are effectively identical.

support the extraordinary remedy invoked in its original bargaining order in Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C.Cir.1994). In Exxel, we reiterated to the Board the well established law of this Circuit that the issuance of a bargaining order is an extraordinary, "somewhat punitive," remedy which "has the effect of ensconcing the union as the employees' exclusive bargaining representative and therefore carries with it the potential of infringing upon employees' Section 7 rights." 28 F.3d at 1248 (citing Caterair Int'l v. NLRB, 22 F.3d 1114, 1122 (D.C.Cir.1994)). Therefore, "we have time and again required the Board to explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order." Exxel, 28 F.3d at 1248 (citing, inter alia, Caterair, 22 F.3d at 1123). On remand, instead of complying with its duty to balance, the Board, continuing in the rogue behavior which we have noted time and again, simply declared the appropriateness of its original remedy, incredibly stating as its sole basis its prior decision in Caterair Int'l, 322 N.L.R.B. No. 11, 1996 WL 514512 (Aug. 27, 1996).

Lest there be any doubt, the Board's Caterair is the very decision which we reversed, noting that we were ordering the Board for the sixth time to cease engaging in its contumacious behavior. See Caterair, 22 F.3d at 1123. Once again, our orders and admonitions to the Board seem to have fallen on deaf ears. Not only does it continue to engage in precisely the process we have condemned in the past, but even cites in support of this recalcitrant behavior the Caterair decision for which we condemned it.

As I have previously suggested, I think we have been overly gentle in our line of cases, including Caterair, rejecting the Board's facile imposition of the extraordinary bargaining orders

remedy. See Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1463-64 (D.C.Cir.1997) (Sentelle, J., concurring). In no other area of our enlightened democratic society would we permit an elitist bureaucracy to deprive citizens of their rights as free actors on the theory that they might have been so deceived by others of differing interests that they cannot by their free choice determine their best interests, but must be subjugated to the decision of an administrative agency. Id. While we can conceive of a commission regulating corporations tossing out the election of a corporate board based on deceit practiced against the shareholders, no one has ever suggested that such a commission could then impose indefinitely on the shareholders an unelected board, on the rationale that shareholder votes thereafter would be the product of "tainted" decisionmaking. We might even imagine an election of a public official being overturned because of fraud, but it is surely inconceivable that a board or commission could then impose its own choice of congressman, senator, or governor because of some continuing taint. Nonetheless, the NLRB persists in its elitist belief that those of the working class cannot be trusted to reject deceit on their own, and that, therefore, their benevolent big brother must watch after them.

Were we not bound by stare decisis, I would find few if any circumstances under which I would uphold a bargaining order. However, I recognize that this Court is bound by precedent. The time has long since come for the Board to recognize not only the constraints of precedent, but its statutory and constitutional duty to obey the law as interpreted by the courts. Under 29 U.S.C. § 160, this Court has jurisdiction to review the orders of the Board. On at least seven occasions we have exercised that jurisdiction to tell the Board that its routine

imposition of remedial bargaining orders is contrary to law. See cases collected in Lee Lumber, 117 F.3d at 1461; Exxel, 28 F.3d at 1248. Eight is enough.

APPENDIX B — ORDER OF UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA, DATED DECEMBER 14, 1995

IN RE EXXEL/ATMOS, INC.,

Petitioner.

No. 95-1278.

United States Court of Appeals,
District of Columbia Circuit.

Dec. 14, 1995.

Before: SILBERMAN, SENTELLE, and RANDOLPH, Circuit Judges.

ORDER

PER CURIAM.

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not demonstrated a clear and indisputable right to the writ. See Gulfstream Aerospace Corp. v Maycamas Corp., 485 U.S. 271, 289 (1988); Reynolds Metals Co. v. FERC, 777 F.2d 760, 762 (D.C. Cir. 1985).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA, DATED NOVEMBER 4, 1994

EXXEL/ATMOS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 93-1108.

United States Court of Appeals,
District of Columbia Circuit.

Nov. 4, 1994.

Petition for Review of an Order of the National Labor Relations Board.

Before: EDWARDS, Chief Judge, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges.

ON RESPONDENT'S SUGGESTION FOR REHEARING EN BANC

ORDER

PER CURIAM.

Appendix C

Respondent's Suggestion for Rehearing En Banc and the Response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Chief Judge EDWARDS and Circuit Judge SILBERMAN would grant the suggestion.

A dissenting statement filed by Circuit Judge SILBERMAN is attached.

SILBERMAN, Circuit Judge, dissenting from the denial of rehearing en banc:

Ordinarily I would not vote to vacate an opinion of this court and to set the case for en banc argument if the opinion merely remanded to the agency for an adequate explanation. I have noted, however, that such an order should be limited to situations where the court is genuinely uncertain as to the agency's legal/policy course. See United States Office of Personnel Management v. FLRA, 905 F.2d 430, 437 (D.C.Cir.1990) (Silberman, J., concurring) ("[W]e must take care not to cajole agencies, through remand for inadequate explanations, into adopting legislative interpretations we lack authority to require."). In this situation we are not uncertain; the court quite obviously just disagrees with the Board's policy. By repeatedly, if episodically, refusing to enforce Board bargaining orders, unless and until the Board articulates limits

on those orders that the court believes desirable, the court has exceeded--rather dramatically in my view--the legitimate scope of judicial review. Compare, e.g., Sullivan Indus. v. NLRB, 957 F.2d 890, 904-05 (D.C.Cir.1992)and Williams Enters., Inc. v. NLRB, 956 F.2d 1226, 1235 (D.C.Cir.1992) with NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1299 (D.C.Cir.1988). And since under the National Labor Relations Act employers throughout the country may petition for review in the D.C. Circuit, the court's posture absolutely prevents the Board from pursuing its policy even though our sister circuits are more deferential. See, e.g., Louisiana- Pacific Corp. v. NLRB, 858 F.2d 576, 578-79 (9th Cir.1988); NLRB v. Hollaender Mfg. Co., 942 F.2d 321, 327-28 (6th Cir.1991), cert. denied, 502 U.S. 1093, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992).

The Board's position is rather straightforward. If an employer violates § 8(a)(5) of the Act by illegally refusing to bargain with a union that the employer has previously formally recognized as the representative of a majority of its employees, the employer will be ordered to bargain with the union. Such a bargaining order obliges the employer to bargain in good faith for a reasonable period of time.

> For over 50 years, an affirmative bargaining order has been the standard Board remedy for an employer's unlawful refusal to bargain with a union which, as of the date of the refusal, enjoys the status of a 9(a) collective- bargaining representative. See, e.g., Inland Steel Co., 9 NLRB 783, 814- 816 (1938). This remedy is warranted even if the union has lost its majority support after the unfair labor practice and even though the order will operate to preclude, for a reasonable period, an election to test majority

> status. In such cases, the Board's paramount concerns are to restore to the union the bargaining opportunity which it should have had in the absence of unlawful conduct and to prevent the possibility that the wrongdoing employer would ultimately escape its bargaining obligation as the result of the predictably adverse effects of its unlawful conduct on employee support for the union.

Williams Enters., Inc., 312 N.L.R.B. 937, 940, 1993 WL 402910 (1993).

Going back to Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35 (1980), this court has been uncomfortable with such orders because it has thought that employees should have an early opportunity (presumably, earlier than what the Board might ex post conclude was a reasonable period of time) to initiate a decertification election, or that an employer should be able readily to force the union to petition for an election to reaffirm its majority status. I have explained in my dissenting opinion in Sullivan Indus. v. NLRB, 957 F.2d 890, 906 (D.C.Cir.1992) (Silberman, J., concurring in part and dissenting in part), that Peoples Gas misread NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), a Supreme Court decision which deals only with the propriety of bargaining orders employed in the unusual situation where a union has not been recognized. The court, I am afraid, continues to labor under the misreading; Peoples Gas is once again relied upon in this case. The premise, accordingly, upon which in this case the court remands to the Board--that a bargaining order is an unusual remedy for an illegal refusal to bargain, even when an employer has previously recognized the union--is simply not correct.

Appendix C

The panel's opinion suggests a rationale upon which it is prepared to enforce the Board's order, but it is a rationale that would compel the Board-- improperly in my view--to set a boundary on what is a reasonable period in this case and to forswear the use of a bargaining order in other cases not before the court. The court recognizes that the illegal refusal to bargain took place only eight months after the union was recognized. A union is normally entitled under Board precedent to an irrebuttable presumption of majority support during the first year after achieving representative status, and the court suggests that the order would be enforced in this case if the Board were to define a reasonable period of time to mean only four months. But when an employer illegally refuses to bargain during the first year after recognizing a union, the employer's unfair labor practice itself presumably contributes to eroding employee support for the union. If a Board order to bargain is applicable only for a period that corresponds to the period remaining in the first year when the unfair labor practice was committed, an employer would thus still have an incentive to engage in illegal conduct.

The corollary to the court's position, which follows our line of cases since Peoples Gas, is that the Board may not issue an order requiring an employer to bargain with a union for a reasonable period of time (which also forecloses an employee decertification election during that period) if the illegal refusal to bargain takes place more than a year after the employer recognized the union. The Board, not surprisingly, refuses to accept the court's view of desirable policy. The Board may be unwilling to spell out ex ante what is a reasonable period of time in such situations because subsequent events may bear on the issue. The Board may also be concerned, however--not unlike Presidents faced with demands for time limits on the

deployment of U.S. troops--that a specified period will provide an incentive to the employer to wait out the period rather than reach a possible agreement.

We have said repeatedly in the Peoples Gas line of cases that the Board has not, to our satisfaction, balanced the interests of employees who wish to be rid of their union (and employers who perhaps also wish to be free of the union) with the Board's desire to return a union back to the position it would have occupied but for the unfair labor practice. As I argued in Sullivan, however, an agency is entitled to enormous deference when it chooses the appropriate remedy to redress a violation of law. See National Treasury Employees Union v. FLRA, 910 F.2d 964, 966-67 (D.C.Cir.1990) (en banc); see also Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 201-02, 111 S.Ct. 2215, 2222-23, 115 L.Ed.2d 177 (1991). For its part, the Board has taken the position that an order to bargain is the appropriate remedy for all § 8(a)(5) violations. If I were a Board member I might well be sympathetic to a somewhat different policy, but I do not believe that we have any judicial warrant to object to the Board's categorical approach or its refusal to spell out ex ante the temporal limits on a bargaining order.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT DECIDED JULY 15, 1994

EXXEL/ATMOS, INC.,

Petitioner,

-v.

NATIONAL LABOR RELATIONS BOARD.

No. 93-1108.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 11, 1994.

Decided July 15, 1994.

Employer sought judicial review of National Labor Relations Board (NLRB) decision finding that it committed unfair labor practices against union and ordering employer to cease and desist from unfair labor practices and to bargain with union upon request. The Court of Appeals, Mikva, Chief Judge, held that: (1) evidence supported finding that employer's new president refused to bargain with union after his predecessor had, within prior year, voluntarily recognized union and, thus, employer committed unfair labor practice by refusing to bargain, and (2) it would remand case to Board to explain why Board's ordering of employer to bargain with union, rather than cease and desist order alone, was justified.

Petition denied in part, case remanded in part.

Appendix D

Francis J. Connell, III, Philadelphia, PA, argued the cause and filed the briefs, for petitioner.

Paul J. Spielberg, Deputy Asst. Gen. Counsel, N.L.R.B., Washington, DC, argued the cause, for respondent. With him on the brief were Linda Sher, Acting Associate Gen. Counsel, N.L.R.B., Aileen A. Armstrong, Deputy Associate Gen. Counsel, and David Seid, Attorney, N.L.R.B., Washington, DC.

Before: MIKVA, Chief Judge, BUCKLEY and RANDOLPH, Circuit Judges.

Opinion of the Court filed by Chief Judge MIKVA.

MIKVA, Chief Judge:

Exxel/Atmos, Inc. ("Exxel" or "Company") seeks review of an order of the National Labor Relations Board ("NLRB" or Board") finding that it committed unfair labor practices against District 9 of the United Steelworkers of America, AFL-CIO ("Union"). Adopting the findings of an Administrative Law Judge ("ALJ"), the Board determined that Exxel's President refused to bargain with, and withdrew recognition from, the duly recognized Union in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and (5). The Board issued an order requiring the company to cease and desist from all unfair labor practices and compelling it to bargain with the Union at the latter's request. We uphold the Board's unfair labor practice finding and its decision not to sponsor an election. However, we remand the case to allow the Board to explain why an affirmative bargaining order, as opposed to the cease and desist order alone, is the appropriate remedy for Exxel's refusal to bargain with the Union.

Appendix D

I. BACKGROUND

Exxel/Atmos is a New Jersey corporation that manufactures and distributes non-aerosol dispensing containers. In the summer of 1990, the Union began an organizing campaign at the Company's Somerset, New Jersey facility. By mid-August it had obtained certification cards from a majority of Exxel's nineteen production and maintenance workers. Realizing that a majority of the employees supported the Union, Exxel's then-President, Peter Gould, faxed a letter to Union officials on September 7, 1990 recognizing the Union as the exclusive representative of a bargaining unit consisting of the Company's production and maintenance workers. The Union accepted Exxel's recognition, and the parties agreed to convene a negotiation meeting on September 12. Later on September 7, however, Exxel laid off five bargaining unit employees, including several of the Union's leading supporters. The Union responded by canceling the September 12 negotiation; the next day it filed an unfair labor practice complaint against the Company with the NLRB. Between September 13, 1990 and May 7, 1991, with the complaint pending, neither party attempted to contact the other regarding negotiations or for any other reason.

In early May, the Union learned that the Board planned to dismiss its unfair labor practice complaint. As a result, on May 7, 1991, Union representative Daniel Applegate contacted Bob Shiels, Exxel's newly installed President, about rescheduling the negotiation session. In what would prove to be a pivotal telephone conversation, Shiels informed Applegate that he would meet with Applegate individually to discuss "where we were," but that no formal negotiations would take place until the employees voted for Union representation in a Board-sponsored election. While acknowledging that his

predecessor had voluntarily recognized the Union, Shiels stated that he "felt firmly" that the employees should have the opportunity to select their own bargaining representatives. Applegate responded that an election was unnecessary because the Company had already recognized the Union, and he declined Shiels' invitation to meet one-on-one. Shiels and Applegate had a substantially similar conversation on July 17, 1991.

Upon learning of the possibility that the Company would bargain with the Union, William O'Donnell, an Exxel supervisor, revealed to the Company's Vice- President on July 24, 1991 an anti-Union petition he had circulated during the Union's initial membership drive. At the time he circulated the petition, O'Donnell was a member of the bargaining unit. The petition bore the signatures of eight bargaining unit members (including O'Donnell's), and the date September 11, 1990 appeared next to each signature. Management was not previously aware of the petition. The next day, July 25, 1991, the Company posted the following inter-office memorandum:

> TO: All Shop Personnel
> FR: Bob Shiels
> DATE: July 25, 1991
> RE: UNITED STEEL WORKERS UNION
>
> We want to let you know of recent events concerning the United Steelworkers Union.
>
> We have received a letter from the union demanding that we bargain and negotiate a contract that would establish your wages, hours and working conditions.
>
> However, we have also learned that a number of

> you signed a petition in September, stating that you do not want union representation.
>
> We really believed, when we recognized the Union, that a majority of you wanted the Union. However, in light of this petition, we are not sure what to do. We plan soon to make the right decision for all concerned.
>
> If you have any questions, please feel free to ask [Company management].

After a number of employees (it is disputed exactly how many, but not more than six) voiced opposition to the Union, Exxel informed the Board that it no longer believed the Union represented a majority of the workers in the bargaining unit and requested a Board-sponsored election. The Union then filed this complaint.

After a two-day hearing, an ALJ concluded that Exxel violated sections 8(a)(1) and (5) of the NLRA by refusing to bargain with, and withdrawing recognition from, the Union. The ALJ found that Shiels' statements in his May 7 telephone conversation with Applegate evinced a refusal to bargain with the Union and that such refusal constituted an unfair labor practice because a reasonable time for bargaining had not elapsed in the period between September 7, 1990, when the Union canceled the originally scheduled bargaining session and May 7, 1991, when it renewed its request for bargaining. The ALJ also noted that the employee petition was irrelevant to his determination because it came to management's attention only after Shiels' refusal to bargain on May 7, 1991.

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Moving to remedial issues, the ALJ ordered Exxel to cease and desist from refusing to bargain and interfering with its employees in the exercise of their right to choose a bargaining representative under Section 7 of the NLRA. In addition, the ALJ ordered Exxel to recognize and bargain with the Union at the latter's request as the exclusive collective bargaining representative of the employees in the unit. On December 16, 1992 the Board adopted the ALJ's substantive conclusions and remedies with only minor modifications, and this petition followed.

II. DISCUSSION

Petitioner challenges the ALJ's finding that Bob Shiels withdrew recognition from and refused to bargain with the Union in the course of his May 7 conversation with Daniel Applegate. Exxel also contends that even if it did commit an unfair labor practice on May 7, the Board's order requiring the Company to bargain with the Union is an unwarranted intrusion upon the rights of its employees to select a bargaining representative of their own choosing. We address these arguments in turn after first setting forth the governing law and relevant standards of review.

A. Governing Law and Standard of Review

The law governing an employer's obligation to bargain with a union it has voluntarily recognized is well established. "The employer is not required to recognize a union on the basis of a majority card showing and has the option to insist on an election." NLRB v. Creative Food Designs, Inc., 852 F.2d 1295, 1297 (D.C.Cir.1988) ("Creative Food"). If the employer chooses voluntarily to recognize the union, however, it is bound

by that recognition and may no longer seek an election. Id. Once recognized, the union enjoys a presumption of continuing majority support. Id. at 1300. For a reasonable time after voluntary recognition, usually one year, that presumption is irrebuttable; after the one-year grace period, the employer may attempt to rebut the presumption of majority support by presenting to the Board " 'clear, cogent, and convincing evidence, that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal [to bargain].' " Id. (quoting NLRB v. Tahoe Nugget, 584 F.2d 293, 297 (9th Cir.1978), cert. denied, 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 290 (1979)).

The scope of our review of NLRB decisions is quite limited. We must uphold the Board's factual findings so long as they are supported by substantial evidence on the record considered as a whole. See 29 U.S.C. § 160(e) (1988); Sullivan Indus. v. NLRB, 957 F.2d 890, 894 (D.C.Cir.1992). Additionally, "we must accept the ALJ's credibility determinations, as adopted by the Board, unless they are patently insupportable." Creative Food, 852 F.2d at 1297. Finally, we owe particular deference to the Board's choice of remedy. See NLRB v. Gissel Packing, 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969) ("In fashioning its remedies under the [NLRA], the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.").

B. Withdrawal of Recognition and Refusal to Bargain

With these clear standards in mind, we first review petitioner's contention that the record lacks substantial evidence to support the ALJ's finding that Bob Shiels, in his May 7

telephone conversation with Daniel Applegate, refused to bargain with and withdrew recognition from the voluntarily recognized Union. Initially, the Company cannot attack the ALJ's finding that a reasonable time for bargaining had not elapsed between Exxel's voluntary recognition of the Union in September, 1990 and the May 7 Shiels/Applegate conversation because that eight-month period falls well within the one-year window within which a voluntarily recognized union enjoys a conclusive presumption of continuing majority support. Accordingly, the heart of Exxel's challenge to the ALJ's unfair labor practice finding is that Shiels did not in fact refuse to bargain with the Union on May 7.

We hold, however, that substantial evidence supports the ALJ's finding. Petitioner attempts to paint Shiels as the cautious new executive who prudently sought to avoid rushing headlong into union negotiations without first becoming familiar with all the issues involved. The Company thus argues that in the May 7 telephone conversation Shiels did not refuse outright to bargain with the Union. Instead, according to the Company, he intended merely to convey that he was unprepared to bargain with the Union "at that time" because he had not yet had the opportunity to confirm that his employees desired the Union's representation.

Being new on board and never having dealt with the Union, Shiels' caution is understandable. But Shiels' own testimony before the ALJ belies any suggestion that he meant only to postpone negotiations until he had familiarized himself with the issues. Shiels did not say only that he wanted to postpone bargaining until he was satisfied that his employees supported the Union; rather, he made clear that he desired an election before proceeding to negotiate with the Union. In response to

the ALJ's question, "And you recall . . . telling [Applegate] that you wanted an election?," Shiels replied, "That's my clear recollection. . . . I wanted to be sure there was an election." Based on this and similar testimony, the ALJ inferred reasonably that Shiels refused to negotiate with, or to recognize, the Union as the employees' bargaining representative "unless and until" an election was held. And, as we stated above, an employer who has previously recognized a union is not entitled to an election absent a reasonable passage of time. We therefore uphold the ALJ's findings, as adopted by the Board, that Exxel violated Sections 8(a)(1) and (5) of the NLRA.

C. The Bargaining Order

The appropriateness of the Board's bargaining order presents a more difficult question. The ALJ's remedy in this case consisted of two orders. The first requires Exxel to cease and desist from refusing to bargain with the Union and from interfering with its employees' rights to choose a bargaining representative. The second compels the Company affirmatively to bargain with the Union at the latter's request. The Board adopted both remedies in full with no explanation.

Pointing to evidence that a number of past and present members of the bargaining unit have voiced opposition to the Union, Exxel asks that the Board's affirmative bargaining order be set aside in favor of an election because it infringes upon its employees' rights under Section 7 of the NLRA "to form, join, or assist labor organizations [and] to bargain collectively through the representative of their own choosing." 29 U.S.C. § 157. At a minimum, the Company asserts, the Board should be made to explain why the bargaining order is the appropriate cure for the Company's unfair labor practice.

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Initially, we reject the Company's contention that the Board abused its discretion by not ordering an election. As we explained in NLRB v. Creative Food Design, 852 F.2d 1295 (D.C.Cir.1988), by voluntarily recognizing a union an employer waives its prerogative to insist upon an election. Id. at 1299. The company thereby agrees in effect to treat the union as if it had won an election and to afford the union all the benefits that accompany full representational status. Chief among those benefits is a conclusive presumption of continuing majority support for one year after voluntary recognition. Thus, by unlawfully refusing to negotiate with the Union absent an election only eight months after recognition, Exxel violated its promise to respect the desires of a majority of its employees and to allow the Union a reasonable time to negotiate. Because Exxel was not at liberty to request an election at that time, ordering an election after the fact would grant the Company an option to which it was not entitled when it committed the unfair labor practice. Such a result would allow employers to circumvent the one-year presumption simply by calling for an election within that year and then presenting to the Board some evidence of an erosion of majority support. As this outcome would be inconsistent with the purposes of the NLRA, we uphold the Board's conclusion that Exxel was not entitled to an election.

We must still decide, however, whether the Board erred in not explaining why a bargaining order, as opposed to the cease and desist order standing alone, was justified in this case. Although it might appear redundant to require a company simultaneously to cease refusing to bargain and to bargain upon request, the Board has attached different legal and practical consequences to the two orders. See Caterair Int'l v. NLRB ("Caterair"), 22 F.3d 1114, 1121-22 (D.C.Cir.1994). Cease and

desist orders are remedial; they require only that the employer "conform his conduct to the norms set forth in the Act." International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 740, 81 S.Ct. 1603, 1608-09, 6 L.Ed.2d 762 (1961). Bargaining orders, in contrast, have a somewhat punitive aspect because under longstanding Board practice they are accompanied by a decertification bar that prevents employees from challenging the union's majority status for a reasonable period of time. Sullivan Industries v. NLRB, 957 F.2d 890, 903 (D.C.Cir.1992). While in some circumstances the decertification bar may be necessary to insulate a fragile union from employer interference, it also has the effect of ensconcing the union as the employees' exclusive bargaining representative and therefore carries with it the potential of infringing upon employees' Section 7 rights. Caterair, 22 F.3d at 1122. Due to the added imposition of the decertification bar, we have time and again required the Board to explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order. See, e.g., Caterair, 22 F.3d at 1123; Sullivan Industries, 957 F.2d at 903-04; Williams Enterprises v. NLRB, 956 F.2d 1226, 1237 (D.C.Cir.1992); Avecor, Inc. v. NLRB, 931 F.2d 924, 934-35 (D.C.Cir.1991); Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 45-47 (D.C.Cir.1980).

A strong argument can be made that the Board's decision to impose a bargaining order was justified because Exxel's refusal to bargain occurred during the first year of voluntary recognition. Unlike cases in which an unfair practice occurs after the first year, imposing merely a cease and desist order in first year refusal cases does not return the parties to status quo. Cf. Caterair, 22 F.3d at 1122 (noting that the cease and desist order is a "sound third option" to an election and bargaining

order because it mandates a return to the status quo). The cease and desist order requires the offending company to bargain, but it does so in a context outside the protective range of the one- year conclusive presumption. In such a setting, but not in the first year, the company (or its anti-union employees) would be entitled to question the union's majority status, and thus would be in a more favorable position vis-a-vis the union as compared to before it committed the unfair labor practice. As such, the decertification bar (provided its duration is substantially tailored to restore to the union that part of the one-year period that was denied it by the company's unfair labor practice) simply affords the union the same protection it rightfully enjoyed during its first year. See Brooks v. NLRB, 348 U.S. 96, 104, 75 S.Ct. 176, 181-82, 99 L.Ed. 125 (1954) (upholding Board policy of barring decertification petitions filed within one year of certification); 1 HARDIN, THE DEVELOPING LABOR LAW 390 (3d ed. 1992) ("To foster collective bargaining and stabilize industrial relations, the Board has long required that in the absence of unusual circumstances a certified union's majority status must be honored for 1 year; and a [decertification] petition filed during the 1-year period will ordinarily be barred."). In other words, not imposing the bargaining order in first year refusal cases would permit the company, by committing an unfair labor practice in the first year, to frustrate the core purpose of the protective period. Such a result would actually encourage unfair labor practices by companies that during the first year become dissatisfied with the Union or the legally required bargaining process.

But no matter how persuaded we may be by the policy arguments favoring the imposition of bargaining orders in first year refusal cases, it is not for us to apply those rationales to a

particular case — at least not in the first instance. It is up to the Board, not the courts, to make labor policy. See Amalgamated Clothing and Textile Workers v. NLRB, 736 F.2d 1559, 1566 n. 5 (D.C.Cir.1984) ("Because requiring unions . . . to have full time organizers present during each labor campaign raises serious questions of labor policy, it is an issue for the Board, not the courts, to settle."). Moreover, it is irrelevant that the court agrees with the Board's decision: "We emphasize that we harbor no disagreement with the Board's policy choices. We ask only for a clear statement of what those choices and the reasons for them are." Sullivan Industries, 957 F.2d at 905 n. 12; cf. Securities & Exchange Comm'n. v. Chenery Corp., 318 U.S. 80, 94-95, 63 S.Ct. 454, 462-63, 87 L.Ed. 626 (1943) (holding that court can affirm administrative order only on grounds on which agency relied and noting that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained"). Accordingly, we remand this case to the Board for that clear explanation.

III. CONCLUSION

Because of the the NLRB's unique knowledge and experience in the field of labor relations, reviewing courts owe "special respect" to its choice of remedies for violations of the NLRA. See NLRB v. Gissel Packing, 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969). We will continue to give those choices the deference they are due. In order to do so in the context of affirmative bargaining orders, however, we must first be satisfied that in issuing such orders the Board has balanced competing labor policies, including the employees' right to representation of their own choice, and has clearly indicated the grounds upon which the order is based.

Appendix D

As we remarked recently, "five times in the past fourteen years, this court has remanded [bargaining] orders to the board with a request for explanation as to why, in the particular circumstances, the extra protection against decertification was necessary." Caterair, 22 F.3d at 1123. Caterair made it "an even half-dozen." Id. We reiterate that sentiment here, hopefully for the final time.

For the foregoing reasons, we deny the petition for review insofar as it challenges the Board's unfair labor practice finding and its decision not to order an election. However, we remand the remedial aspect of the case for the Board to explain its imposition of the bargaining order.

So ordered.

END OF DOCUMENT

APPENDIX E — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED JUNE 5, 1997

EXXEL-ATMOS, INC.

AND

UNITED STEELWORKERS OF AMERICA, AFL — CIO

Case 22-CA-20475
Dated, Washington, D.C. June 5, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed by the United Steelworkers of America, AFL — CIO, on February 21, 1995, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on April 27, 1995, against Exxel-Atmos, Inc., alleging that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The Respondent filed an answer to the complaint on May 9, 1995, admitting in part and denying in part the complaint allegations and asserting affirmative defenses.

On August 10, 1995, the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached. On August 14, 1995, the Board issued an Order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On September 6, 1995, the Respondent filed a reply

Appendix E

to the General Counsel's Motion for Summary Judgment and a cross-motion for summary judgment requesting that the complaint be dismissed.

Ruling on Motion for Summary Judgment

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a New Jersey corporation with an office and place of business in Somerset, New Jersey, has been engaged in the manufacture, sale, and shipment of non-gas aerosol delivery systems. During the 12-month period ending April 27, 1995, the Respondent, in the course and conduct of its business operations has sold and shipped from its Somerset, New Jersey facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (5) by withdrawing recognition and refusing to bargain with the Union as the exclusive collective-bargaining representatives of the unit, consisting of production and maintenance workers, by soliciting and instigating the decertification of the Union and by giving a Christmas bonus to its unit employees without giving notice or the opportunity to bargain to the Union.

Appendix E

A. Facts

The Respondent, Exxel-Atmos, Inc., is a small manufacturer of nonaerosol dispensing systems in Somerset, New Jersey. The Respondent voluntarily recognized the Union as the collective-bargaining representative of its production and maintenance employees, without an election, on September 7, 1990.[1]

In May 1991, the Respondent unlawfully refused the Union's request for bargaining. In August 1991, the Respondent withdrew recognition from the Union and subsequently refused to bargain. The Board found that the Respondent violated Section 8(a)(1) and (5) of the Act by this conduct. The Court of Appeals for the District of Columbia issued its judgment dated July 15, 1994. Exxel-Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C.Cir.1994), enforcing in part and denying in part 309 NLRB 1024 (1992); petition for rehearing denied 37 F.3d 1538 (D.C.Cir.1994). That decision upheld the finding of the Board that the Respondent unlawfully refused to bargain with the Union in May 1991, and thereafter unlawfully withdrew recognition from the Union in September 1991. As to the remedy, the court enforced the Board's cease-and-desist order against the Respondent, but declined to enforce the Board's affirmative bargaining order. The court remanded the case to the Board for an explanation why such a bargaining order was the appropriate remedy. The Board subsequently reaffirmed its affirmative bargaining order.[2]

The undisputed facts in the instant case arose after the

1. Exxel-Atmos, Inc., 309 NLRB 1024 (1992).

2. Exxel Atmos, Inc., 323 NLRB No. 159 (June 5, 1997).

court's decision.[3] On about December 7, 1994, the Respondent's president, Ronald Lemke, held a meeting for all production and maintenance employees. At the meeting, Lemke read from a prepared speech that gave the unit employees instructions on how to decertify the Union. The text of the speech also informed the employees that the

> federal appeals court has now decided that the Company will be required to bargain with the Steelworkers union unless our employees clearly indicate that you [sic] do not want to have the union represent you. So, unless a sufficient number of you indicate that you do not want the union, if the union requests that we bargain with it, we will have to do so. [Emphasis marks handwritten on original prepared text.]

Lemke's invitation for questions from the employees drew no response. At the conclusion of the speech, Lemke left copies of the text of the speech, along with the address and telephone number of the Regional Office, on a table in the lunchroom for employees to take with them. Within days of the speech, form letters indicating dissatisfaction with the Union were circulated and signed by unit employees. In January 1995, employee Jay Soni presented Lemke with approximately 13 signed form letters. These letters later became the showing of interest for the decertification petition.

Further, the Respondent, without bargaining with the Union, decided to give all unit employees a first-time cash bonus of $100, referred to as a "Christmas Bonus." This bonus

3. The court of appeals issued its decision denying the Board's motion for rehearing en banc on November 4, 1994.

was paid sometime during the week of December 23, 1994. Lemke states in his affidavit that he and the Respondent's director of operations, Tom Sedita, made the decision to give the first-time bonus to show the Respondent's appreciation for the increased sales generated by the employees during 1994.

Based on the form letters from employees expressing dissatisfaction with the Union, the Respondent canceled all bargaining sessions scheduled for early 1995 and has since consistently refused to bargain with the Union.

On January 26, 1995, employee Soni, filed a decertification petition in Case 22-RD-1136. This petition is currently pending in the Regional Office for Region 22.

B. The Parties' Contentions

The General Counsel argues that despite the issuance of the court's judgment enforcing the Board's Order that the Respondent cease from refusing to bargain with the Union, the Respondent continues to refuse to bargain in violation of Section 8(a)(5) and (1). The General Counsel asserts that the Respondent met with the unit employees and provided them with unsolicited instruction on how to decertify the Union in violation of Section 8(a)(1), and, thereafter, decided to grant unilaterally all the unit employees a first-time cash bonus of $100, referred to by the Respondent as a "Christmas bonus" in violation of Section 8(a)(5) and (1).

In its answer to the complaint, the Respondent does not dispute any of the factual allegations. It, however, denies that the Union is the exclusive bargaining representative for its employees. It further denies that Lemke's December 7, 1994

speech to the employees served to solicit and/or instigate a decertification of the Union because the speech did not contain threats or a promise of benefits to the employees. The Respondent admits that it gave its employees a $100 cash Christmas bonus, but denies that the Company had a duty to provide notice to or the opportunity to bargain with the Union prior to giving the bonus to the unit employees. The Respondent admits that the Union requested it to bargain collectively on January 11, 1995, but denies that the Company unlawfully failed to bargain, asserting that it had a good-faith doubt as to the Union's majority status as of January 10, 1995, and that doubt was confirmed when the bargaining unit employees filed the decertification petition on January 26, 1995. Further, it acknowledges that the copy of the speech attached to the General Counsel's motion actually reflects the text of the speech given by Lemke to its employees on December 7, 1994. It asserts, as an affirmative defense, that the speech is protected by Section 8(c) of the Act; that it could not have instigated or solicited a decertification petition in view of its employees' past expressions of antiunion sentiment; that the granting of the Christmas bonus was a gift to its employees and was no more than an appropriate seasonal act by a responsible employer; and that the act was de mininis and cannot provide the basis for a violation of the Act.

C. Analysis

In Exxel-Atmos, Inc., 323 NLRB No. 159 (June 5, 1997), we affirmed our original findings that the proper remedy for the Respondent's earlier withdrawal of recognition and refusal to bargain with the Union is an affirmative bargaining order requiring the Respondent, upon request, to bargain with the Union for a "reasonable period of time." The Respondent,

however, has never acceded to any union demands for bargaining since its August 1991 unlawful withdrawal of recognition. In these circumstances, it is clear that a reasonable time for bargaining has not elapsed and that the Respondent's refusal to bargain violated Section 8(a)(5) and (1) of the Act.

In his unsolicited speech, the Respondent's president, Lemke, provided the unit employees with instructions on how to decertify the Union. In doing so, the Respondent unlawfully instigated the decertification petition among its employees in violation of Section 8(a)(1) of the Act.[4]

The Respondent admits that it gave its employees a $100 cash bonus on about December 23, 1994. This bonus was a clear deviation from past practice.

It is well-settled Board law that a bonus paid to employees, at Christmas or otherwise, is a condition of employment and the proper subject of collective bargaining.[5] In Niles-Bement-Pond Co., 97 NLRB 165 (1951), enfd. 199 F.2d 713 (2d Cir.1952), the Board held that although a year end bonus "may be paid at Christmas and therefore carry with it the Christmas spirit of gift giving, [such a bonus] amounts fundamentally to deferred compensation for services performed during the preceding year." Id. at 167.

The Respondent further concedes that the "Christmas

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4. Weisser Optical Co., 274 NLRB 961 (1985), and cases cited therein.

5. Cypress Lawn Cemetery Assn., 300 NLRB 609, 613 (1990); Singer Mfg. Co., 24 NLRB 444, 470 (1940), enfd. in relevant part 119 F.2d 131 (7th Cir.1941), cert. denied 313 U.S. 595 (1941).

bonus" was related to the increased sales performance of its employees in 1994. As we have stated, "the policy of the Act to encourage collective bargaining in the interest of industrial peace is best served by requiring an employer to negotiate on the subject matter of such a bonus." Id. at 167.

We conclude, therefore, that the $100 cash "Christmas bonus" constitutes wages, and as such, is a proper subject for collective bargaining. The Respondent's unilateral action on granting the bonus violated Section 8(a)(5) and (1) of the Act.

Finally, even had we not determined in the underlying Exxel-Atmos case that the Respondent was precluded from withdrawing recognition as a result of the affirmative bargaining order, we would find that the Respondent could not lawfully withdraw recognition based on the January 1995 decertification petition. Thus, that petition is tainted because it was unlawfully instigated by the Respondent in violation of Section 8(a)(1) and was circulated in the context of the Respondent's unilateral grant of the $100 "Christmas bonus" which violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. By withdrawing recognition and refusing on and after January 11, 1995, to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By making a speech on about December 7, 1994, and providing unsolicited information on how to decertify the Union, the Respondent has violated Section 8(a)(1) of the Act.

Appendix E

3. By conferring on its employees a $100 cash "Christmas bonus," the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for its employees.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

Appendix E

ORDER

The National Labor Relations Board orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Steelworkers of America, AFL—CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by the Respondent at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

(b) Soliciting and/or instigating a decertification petition among its employees.

(c) Refusing to bargain in good faith by making unilateral changes without providing notice to the Union and an opportunity to bargain.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

(b) On request, bargain with the Union regarding the granting of a "Christmas bonus" to unit employees.

(c) Within 14 days after service by the Region, post at its facility in Somerset, New Jersey, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 1994.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible

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6. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

William B. Gould IV
Chairman

Sarah M. Fox
Member

John E. Higgins, Jr.
Member

Appendix E

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with United Steelworkers of America, AFL—CIO as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time production and

maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

WE WILL NOT solicit and/or instigate a decertification petition among our employees.

WE WILL NOT refuse to bargain in good faith by making unilateral changes without providing notice to the Union and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

WE WILL, on request, bargain with the Union regarding the granting of a "Christmas bonus" to unit employees.

EXXEL-ATMOS, INC.
NATIONAL LABOR RELATIONS
BOARD (N.L.R.B.)

APPENDIX F — SUPPLEMENTAL DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED JUNE 5, 1997

EXXEL-ATMOS, INC.

AND

UNITED STEELWORKERS OF AMERICA, AFL — CIO
Case 22-CA-17889
Dated, Washington, D.C. June 5, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 16, 1992, the National Labor Relations Board issued its Decision and Order[1] in this proceeding. The Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and refusing to bargain with it. In addition to an order requiring the Respondent to cease and desist from this conduct, the Board imposed an affirmative bargaining order requiring the Respondent, upon the Union's request, to recognize and bargain with it.

On July 15, 1994, the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's unfair labor practice findings and conclusions and enforced the remedial order with the exception of the affirmative provision requiring the Respondent to recognize and bargain with the Union.[2] The court remanded the case to the Board for an

1. 309 NLRB 1024.

2. 28 F.3d 1243 (D.C.Cir.1994).

explanation justifying, beyond the cease-and-desist order, the imposition of an affirmative bargaining order. On November 4, 1994, the court denied the Board's petition for rehearing en banc.[3]

On February 1, 1995, the Board advised the parties that it had accepted the remand and invited statements of position. The Respondent and the General Counsel filed statements of position.

The National Labor Relations Board has considered its original decision and the record in light of the court's remand and the parties' statements of position.[4] We have decided to affirm the Board's previous Decision and Order.

The Board's statement of policy concerning the imposition of affirmative bargaining orders is set forth in Caterair International.[5] In Caterair we reaffirmed our longstanding policy of issuing an affirmative bargaining order as the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an

3. 37 F.3d 1538 (D.C.Cir.1994).

4. We reject the Respondent's contention that the Board should not reconsider imposing an affirmative bargaining order to remedy its 1991 unfair labor practices as the issue is moot because the Board proposed that the court enter a judgment containing a cease-and-desist order. The court's enforcement of the cease-and-desist portion of the order does not render moot the question of whether an affirmative bargaining order is appropriate. The court specifically remanded, for explanation, the issue of whether an affirmative bargaining order is a necessary remedy.

5. 322 NLRB No. 11 (Aug. 27, 1996).

incumbent union and subsequent refusal to bargain. As we stated in Caterair:

> [E]xperience confirms our view that a bargaining order is routinely appropriate even when the incumbent union has lost its majority support after the employer's unfair labor practices, and even though the order will, for a reasonable period, preclude a decertification election to test the union's majority status.
>
> . . . .
>
> . . . An affirmative bargaining order certainly serves the interests of the incumbent union by restoring "the bargaining opportunity which it should have had in the absence of unlawful conduct."
>
> Id., slip op. at 2, 4, citing Williams Enterprises, 312 NLRB 937, 940 (1993), enfd. 50 F.3d 1280 (4th Cir.1995).

We also explained in Caterair, that we have considered and balanced the critical statutory policies and rights relevant to the affirmative bargaining remedy and find no need to engage in a case-by-case factual analysis to justify its future imposition.

Therefore, for the reasons set forth in Caterair, we affirm our finding that an affirmative bargaining order is the appropriate remedy for the Respondent's unlawful withdrawal of recognition from the Union and its refusal to bargain.

The Respondent asserts that if the Board finds that an affirmative bargaining order is warranted, then the Board should

expressly clarify that the decertification bar that accompanies an affirmative bargaining order applies for only 4 months from the date of the order.[6] The Respondent notes that the court stated in its remand Order that "the decertification bar (provided its duration is substantially tailored to restore to the union that part of the one-year period that was denied it by the company's unfair labor practice) simply affords the union on the same protection it rightfully enjoyed during its first year."[7] The court made this observation in connection with its discussion of some policy considerations which are relevant to the issuance of an affirmative bargaining order. The court, however, specifically stated that it was up to the Board, in the first instance, to make labor policy.

The Board's view of this matter was recently set forth at length in Lee Lumber & Building Material Corp., 322 NLRB No. 14 (Sept. 6, 1996). In Lee Lumber, the Board noted (slip op. at 3) that an employer's unlawful refusal to recognize and bargain with an incumbent Union is likely to have "a significant, continuing detrimental impact on employees, causing them to become disaffected from the union." Requiring the employer that has engaged in this unlawful conduct to bargain for a "reasonable time" is aimed at to restoring the union to the position it would have been in absent the unlawful withdrawal of recognition.[8] A "reasonable time" does not depend on either

6. This figure is based on the Respondent's view that the court required only that it recognize and bargain with the Union for 1 year. Since 8 months had elapsed between the Respondent's September 1990 voluntary recognition of the Union and its May 1991 refusal to bargain, the Respondent claims that the Board can only require it to bargain with the Union for the 4 months remaining in this 1-year period.

7. 28 F.3d 1243 at 1248.

8. In Lee Lumber, we held that in the absence of special (Cont'd)

the "passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during the meetings." Id. slip op. at 5. In assessing whether there has been bargaining for a reasonable time the Board considers the degree of progress made in negotiations, whether or not the parties are at impasse, and whether the parties are negotiating for an initial contract.[9] Obviously, the determination of whether a reasonable time has elapsed cannot be made prospectively, but can only be made after an examination of the bargaining history.

Accordingly, we adhere to the Board's earlier determination that an affirmative bargaining order requiring that the parties bargain is the appropriate remedy. And, consistent with our rationale in Lee Lumber, we shall require the Respondent, upon the Union's request, to bargain with it for a "reasonable period."

(Cont'd)

circumstances — not here applicable — the presumption of unlawful taint caused by an employer's unlawful withdrawal of recognition and refusal to bargain "can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Id., slip op. at 4.

9. Id.

Appendix F

ORDER

The National Labor Relations reaffirms its original Order, reported at 309 NLRB 1024 (1992), and orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

William B. Gould IV
Chairman

Sarah M. Fox
Member

John E. Higgins, Jr.
Member

APPENDIX G — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED DECEMBER 16, 1992

EXXEL-ATMOS, INC.

AND

UNITED STEELWORKERS OF AMERICA, AFL—CIO
Case 22-CA-17889
Dated, Washington, D.C. December 16, 1992

DECISION AND ORDER

In this proceeding the Board must determine whether the Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully withdrawing recognition from the Union.

On July 23, 1992, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions to the judge's decision and a supporting brief. The General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

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1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are

(Cont'd)

Appendix G

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b) and reletter the remaining paragraph.

(Cont'd)

incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir.1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding (at one point designated an "alternative finding" by the judge) that the Respondent violated Sec. 8(a)(1) and (5) of the Act on May 7, 1991, by refusing to meet with the Union's full bargaining committee to engage in any "formal" negotiations. We further adopt his finding that it withdrew recognition by that refusal, together with its refusal to bargain, unless and until the employees voted in an election. We therefore find it unnecessary to pass on the judge's alternative findings based on actions subsequent to May 7. We have modified the Order to include a provision requiring the Respondent to cease and desist from refusing to meet with representatives of the employees designated by the Union.

The judge inadvertently refers to June 10 and 12, 1990, and July 1990. The correct dates are September 10 and 12, 1990, and July 1991. The judge also misspells the surname "Appelgate" throughout his decision. The correct spelling is "Applegate." Finally, the judge improperly cites the case number for the Respondent's RM petition. The correct case number is 22-RM-679.

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"(c). Refusing to meet with the representatives of the employees as designated by the Union."

2. Substitute the attached notice for that of the administrative law judge.

James M. Stephens
Chairman

Dennis M. Devaney
Member

John N. Raudabaugh
Member

Appendix G

APPENDIX

Notice To Employees

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice:

WE WILL NOT withdraw recognition from or refuse to meet and bargain collectively with United Steel Workers of America, AFL — CIO (the Union), as the exclusive bargaining representative of our employees in the appropriate bargaining unit set forth below.

WE WILL NOT refuse to meet with the representatives of the employees designated by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL on request, recognize, meet, and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract. The appropriate unit is:

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All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

EXXEL-ATMOS, INC.

DECISION

Statement of the Case

Steven B. Fish, Administrative Law Judge:

Pursuant to charges and amended charges filed by United Steelworkers of America, AFL—CIO, herein called Charging Party or the Union, on August 8, 1991, and September 11, 1991[1] respectively, the Director for Region 22 issued a Complaint and Notice of Hearing on November 27, alleging that Exxel/ Atmos, Inc., herein called Respondent violated Section 8(a)(1) and (5) of the Act, by in substance withdrawing recognition from and refusing to bargain with the Union.

The trial with respect to the issues raised by said complaint was held before me in Newark, New Jersey on March 16 and March 27, 1991.

Briefs have been filed by General Counsel and Respondent. The certification of service filed with General Counsel's brief dated May 29, 1991 indicates that service was made by certified

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1. All dates hereinafter are in 1991 unless otherwise indicated.

mail upon Respondent's attorney, and by regular mail upon the parties. Such certification does not indicate how service was made upon the Administrative Law Judge. However, a cover letter dated May 29, 1991 to the undersigned states "enclosed please find an original and 3 copies of the General Counsel's brief in the above-captioned matter."

On June 18, Respondent submitted a reply brief dated June 16, 1991, although it neither asked for nor received permission to file such a document. In the reply brief, Respondent contends that General Counsel's brief was untimely and should be rejected. Respondent argues that since General Counsel did not in its papers indicate that service of the brief to the Administrative Law Judge was hand delivered or made by fax, the assumption is that the breif was not so served, and was therefore untimely, since the due date for receipt was May 29, 1991. Respondent further contends that therefore General Counsel had in his possession a copy of Respondent's brief, and had the opportunity to fashion his arguments in response to Respondent's brief, an advantage denied to Respondent.

Respondent in its reply brief then responded to General Counsel's brief asserting that General Counsel made various misstatements of fact and law.

By letter dated June 25, 1991, General Counsel urges that since Respondent neither asked for nor received permission to file a reply brief, that said brief be rejected and not considered. Moreover, with respect to the filing of its own brief, General Counsel asserts that a copy was hand delivered to the Division of Judges on May 29, 1991 in a timely fashion, and the failure to so indicate on the certification of service was an inadvertent error.

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Although General Counsel did not file a supplementary certification or affidavit of service indicating hand delivery of the brief on May 29, which would have been appropriate, I shall accept his assertion in his letter that timely service was effectuated in that manner. Therefore, I shall deny Respondent's request to reject General Counsel's brief.

However, in view of the uncertainty created by General Counsel's failure to properly establish timely service, I deem it appropriate to receive and consider Respondent's reply brief notwithstanding its failure to request permission to file such a document. Accordingly, I shall deny General Counsel's request to reject Respondent's reply brief.

Based upon my review of the entire record,[2] I make the following

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a corporation with an office and place of business in Somerset, New Jersey, herein called Respondent's faciliy, where it has been engaged in the manufacture, sale and shipment of non-gas aerosol delivery systems. During the past year, Respondent sold and shipped from its facility, products, goods and materials valued in excess of $50,000 directly to points outside the state of New Jersey.

2. While every apparent or non-apparent conflict in the evidence may not have been specifically resolved herein, my findings are based upon my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is hereby discredited.

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It is admitted and I so find that Respondent is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted and I find the Union is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

In the summer of 1990, the Union began an organizational campaign amongst Respondent's employees. After obtaining cards from a majority of employees, the Union filed a petition in Case No. 22-RC-10360. On August 13, 1990, the parties entered into a Stipulation providing for an election, as well as a stipulation with respect to eligibility to vote consistent with Norris Thermador 119 NLRB 1301 (1958). The list contained nineteen names.

By September 7, 1990, Respondent having concluded that a majority of employees in the agreed upon bargaining unit desired to be represented by the Union, faxed to the Union an agreement signed by its president Peter Gould, to recognize it as the exclusive representative of Respondent's employees in a unit of production and maintenance employees, quality control employees, laboratory technicians and senior technicians. On the same day, Daniel Appelgate, the Union's staff representative responded also by fax, accepting recognition, and requesting that he be telephoned in order to arrange dates for negotiation.

On the very same day, September 7, 1990, Respondent laid off five bargaining unit employees, including many of the Union's key supporters. Appelgate upon being informed about

the layoffs, immediately telephoned Respondent's attorney Francis Connell III. Appelgate complained to Connell about the layoff of the employees and asked that they be put back to work. Connell replied that the decision to lay off was based solely on economic factors and that Respondent was losing money. Appelgate also asked Connell to set up a meeting to bargain and negotiate a contract. Connell responded that he would check with Gould about available dates. Appelgate suggested any day during the next week, commencing September 10.

Upon checking with his client, Connell discovered that the only date available for a meeting was Wednesday, September 12. Accordingly, Connell called the Union's office and left a message on a tape machine that Respondent would be willing to meet with Appelgate and the Union on September 12 at 3:30 P.M. On Monday, September 10, Appelgate called Connell and they confirmed a meeting for September 12 at 3:00 PM at Respondent's premises. Appelgate advised Connell that he would be bringing with him his Assistant Director Manny Mihrail. Later that morning, Mihrail called Connell and asked if the meeting could be rescheduled for Thursday or Friday, September 13 or 14. Connell replied that he would be out of town on those days. Mihrail told Connell that he would change his appointment and be available for the September 12 meeting.

However, at 12:15 P.M., that day, a message was taken at Connell's office from Appelgate cancelling the meeting. The message read, "can't meet with you on Wednesday. Will reschedule". On that same day, September 10, 1990, Michael Donnelly, one of the employees laid off by Respondent, filed charges with the Region in Case No. 22-CA-17244, alleging Respondent had violated Section 8(a)(1) and (3) of the Act by

laying off Donnelly and four other employees because of their membership and activities on behalf of the Union. On September 13, 1990, the Union filed a similar charge in Case No. 22-CA-17253. Later that day, Appelgate called Connell and informed him that the Union had filed charges with respect to the layoff, and that he had asked the Region to consider the charges as blocking charges vis a vis the election scheduled for October 5, 1990. Connell subsequently telephoned the Board Agent, Eric Shechter to confirm Appelgate's information concerning the election. According to Connell, Shechter informed him that as far as he (Shechter) knew, the Union, had not asked the Board to block the election, and as far as he knew, the election would go forward after the unfair labor practices were disposed of. At some subsequent point, undisclosed by the record, the election scheduled for October 5, 1990 was postponed.

On October 9, 1990, Connell sent a 14 page position paper to the Region, in connection with the pending unfair labor practice charges. In that document, Connell asserted that after the bargaining session was postponed, "the NLRB subsequently notified the Company that the Union had decided to refuse the Company's offer of voluntary recognition." Connell admitted in his testimony that he could not recall the Board Agent specifically stating that the Union was "refusing the Company's offer of recognition", but claims that he would not have written it in the position paper, had it not been told to him. Appelgate denies that he ever told the Board Agent that the Union was refusing the Respondent's offer of recognition. There is no evidence that the Union ever received or saw a copy of Respondent's position paper, submitted to the Board by Connell.

Between September 13, 1990 and May 7, 1991, neither

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Appelgate nor anyone else from the Union made any efforts to contact Respondent concerning negotiations or for any other reason.

The above findings with respect to the events up to May 7, 1991 are based on a synthesis of the credible testimony of the witnesses, plus my evaluation of documentary evidence submitted by the parties. Thus, I credit Connell, contrary to Appelgate's testimony and conclude that a bargaining session had been scheduled for September 12, and was subsequently canceled by the Union.

In that connection, I rely principally on Connell's calendar which included the meeting on that date with a line through it, Respondent's phone memo dated September 10, indicating a message from Appelgate to Gould, reading, "cancel meeting on Wednesday", plus Connell's memorandum to his file dated September 11, 1990, which described fully the circumstances consistent with his testimony. Although Appelgate also submitted his calendar which did not have any entries for September 12, I find Respondent's evidence on this issue more persuasive, and conclude that Appelgate probably neglected to include the meeting in his calendar for June 12 since it was canceled later on in the very same day, June 10, 1990 that the meeting had been agreed to.

Additionally, I have not credited Appelgate's testimony that he tried to call Gould once a month from October of 1990 to May 1991 in order to request negotiations and on each occasion left a message to call back. Rather, I credit the testimony of Respondent's clerical employees supported by their examination of Respondent's phone records, that no such messages were left, as well as the fact that all calls for Gould

would have been directed to his successor Robert Shiels, who replaced Gould as president of Respondent in November of 1990. I would also note the Region's Order Consolidating Cases and Dismissing Petitions which issued on December 5, 1991. That document asserts that the Union requested Respondent to bargain after (emphasis supplied) disposition of pending unfair labor practice charges. Finally, I rely on Appelgate's own testimony as to why he did not follow up on his alleged efforts to call Respondent only once a month. He explained his failure to make a more substantial effort to contact Respondent, by pointing out that the unfair labor practice charges were still pending and he was hoping that the employees would be returned to work as a result of such charges. I conclude therefore that Appelgate and the Union decided not to make any efforts to negotiate with Respondent, until the disposition of the unfair labor practice charges. I further conclude that when Appelgate called Respondent on May 7, 1991, that he was aware at that time that the charges were going to be dismissed unless withdrawn, and that is the reason that he made the call at that time to attempt to commence negotiations with Respondent.[3]

On May 7, Shiels returned Appelgate's telephone call. Appelgate requested that Respondent meet with him and his committee of employees to negotiate a contract. Shiels replied that would agree to meet with Appelgate one on one to discuss what the issues are and for him (Shiels) to find out "where we were". However, Shiels also told Appelgate that there would be no formal negotiations unless the employees voted for representation by the Union in an election. Shiels added that

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3. Although the charges wered withdrawn on May 31, I find it likely that the Union had been notified of the Region's decision to dismiss the charges absent withdrawal, and were still deciding whether or not to withdraw the charges when Appelgate made his call.

he wanted the employees to have an opportunity to pick their bargaining representativew or at lease vote for their wishes. Shiels emphasized that he "felt firmly" about that. Appelgate responded that an election was not necessary, since the Union had the cards and had a written agreement by Respondent for recognition.[4] Appelgate would not agree to Shiels' request for a one on one meeting, insisting that the parties commence formal negotiations immediately with the full bargaining committee present.

On June 17, Appelgate and Shiels again spoke by telephone, and the conversation was virtually identical as the May 7 discussion between them.

I have credited Shiels' version of the conversations between him and Appelgate. While Shiels recalled that the discussions took place in early 1991, I find his testimony concerning dates not to be accurate, in view of the phone logs, and the other evidence as detailed above, which indicates that the Union did not call until May when it became aware that the charges were to be dismissed. I also credit Shiels that there were two conversations between him and Appelgate, which is also supported by Respondent's phone memo dated June 17. This memo reflects that on June 17, Shiels left a message with Jesus Osuna, Respondent's Vice President that he (Shiels) wants to see Osuna about a phone conversation between Shiels and Appelgate of the Union. I conclude that this June 17 memo refers to the second conversation between Shiels and Appelgate, wherein Shiels recalled that the substance of the discussion was identical to his May 7 conversation with Appelgate.

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4. Shiels admitted that he was familiar with the September 7, 1990 agreement by Respondent to recognize the Union, signed by Gould, Shiels' predecessor as president.

Appendix G

By letter dated July 16, 1991, to Shiels, Appelgate requested that Respondent call him at their earliest convenience to arrange mutually acceptable dates for contract negotiations. Upon Respondent's receipt of the July 16 letter on July 17, Shiels instructed Osuna to call Appelgate the first thing next morning.[5] On July 18, at 8:49 AM. Osuna placed a call to the Union at the telephone number on the Union's July 16 letter, 908-287-4011. Appelgate was not there, so Osuna left a message with his full name, phone number, and that he was from Exxel, and asked Appelgate to return the call.

Appelgate asserts that the message that he received read only "Jesus", without any last name, phone number or other identification, so he did not know that his call had been returned by Respondent.

William O'Donnell who had been a bargaining unit employee, until he was promoted to supervisor in April of 1991, heard talk in July of 1991 that Respondent would be commencing negotiations with the Union. O'Donnell had circulated a petition on September 11, 1990, when he was a bargaining unit employee. The petition which he prepared without any involvement from or knowledge of Respondent's supervisors, was entitled "Petition to keep Union out". It went on to read, "We the EMPLOYEES of EXXEL container, DO NOT want to be represented by the United Steel Workers Union nor any other Union. We do our own talking". O'Donnell's signature appeared first, followed by the signature of seven other bargaining unit employees, Vinny Dao, Nick Rybski, Robert Barney, Ghanshyam Patel, Thakorbai Patel, Bhanabhai

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5. The record does not reflect what Shiels instructed Osuna to say to Appelgate.

Patel,[6] and Thuy T- Phan. A date of September 11, 1990 appeared next to each of the names. Of the eight names on the petition, seven of them, (all but Thy Phan) testified herein and confirmed their signatures on the petition, and except for employee Rybski, that they had signed the petition in September of 1990.[7] O'Donnell testified that he circulated the petition when he found out Respondent intended to recognize the Union. After obtaining these signatures, O'Donnell called the NLRB and was allegedly told that "I did not follow procedure, that this has no validation, basically it wasn't up to me to do this." O'Donnell then placed the petition in the glove box in his truck, where it remained until July of 1991.

On or about July 24, 1991, O'Donnell after hearing about the possibility of Respondent negotiating with the Union, decided to inform Respondent about the petition. O'Donnell informed Osuna that he (O'Donnell) had a petition indicating that the employees didn't want a union, which was signed in September of 1990, and asked if Osuna wanted to see it. Osuna replied that he did not know if it would do any good, but that he would like to see the petition. O'Donnell then gave the petition to Osuna. Osuna asserts that the receipt of petition created a doubt in his mind whether the Union had lost their majority status. At that time, Respondent employed fourteen employees, and the list contained eight signatures, all of whom were still employed by Respondent.[8]

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6. The three Patels are not related.

7. As noted above, in September of 1990, the bargaining unit consisted of nineteen employees.

8. As noted, O'Donnell whose name also appeared thereon, was a supervisor in July of 1991.

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After consulting with its attorney, Respondent prepared an inter office memo dated July 25 and posted it in the plant. The memo reads as follows:

EXXEL/ATMOS, INC.

INTER-OFFICE MEMO

TO: All Shop Personnel

FM: Bob Shiels

DATE; JULY 25, 1991

SUBJECT: UNITED STEELWORKERS UNION

We want to let you know of recent events concerning the United Steelworkers Union.

We have received a letter from the union demanding that we bargain and negotiate a contract which would establish your wages, hours and working conditions.

However, we have also learned that a number of you signed a petition in September, stating that you do not want union representation. We're trying to decide what to do.

We really believed, when we recognized the Union, that a majority of you wanted the union. However, in light of this petition, we are not sure what to do. We plant to decide soon to make the right decision for all concerned.

If you have any questions, please feel free to ask Jesus Osuna, Steve Leggin, Gene Paino, or your supervisors.

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Subsequent to the posting of this memo, on July 25, employee Robert Barney told Respondent's plant supervisor Steve Leggin "I don't want no Union". Leggin wrote a memo to this effect dated July 25 at 2:35 P.M., after reporting the conversation to Osuna.[9]

Eugene Paino, Respondent's Vice President of technical services, testified that on or about August 1, employee Nick Rybski came to him and expressed anti- union sentiments. According to Paino, Rybski mentioned that he "wasn't too fond of unionism", that he was "anti-union"; and that he "didn't want to see a Union in Exxel". Paino further testified that he immediately reported the conversation to Osuna, who wrote a memo dated August 1, stating that Paino had told Osuna at 1:30 P.M. on that date, that "Niels Rybski did not want a union". Rybski, while admitting that his signature appeared on the 1990 petition, did not recall having signed it, nor did he recall any conversations with Paino or any other Respondent official in 1991 where he stated that he did not want the Union. Rybski did recall complaining to Osuna in 1990 about having to go into the Union because he "Rybski" was a salaried employee. Additionally Rybski's affidavit unequivocally denies having spoken to anyone else about the Union subsequently, and denies further that he had spoken to Paino, Osuna or any other representative of Respondent concerning his preferences regarding the Steelworkers or any other Union.

Additionally, Tomasco testified that on July 26, employee Ghanshyam Patel approached him and stated that he (Ghanshyam) didn't want the Union anymore. Tomasco asserts that he reported this to Leggin, and overheard Ghanshyam tell Leggin that "he" didn't want the Union, and that "we" didn't

9. Leggin's testimony in this regard was corroborated by Barnes.

want the Union, without any further identification of "we". Leggin, however; recalls that Tomasco informed him that Ghanshyam had said to Tomasco that he (Ghanshyam) and Sudhirnbai, Bhanubhai, and Thakorbhai Patel did not want a Union.[10] Leggin also testified that when he spoke to Ghanshyam in Tomasco's presence, Ghanshyam confirmed that he plus the other three Patel's did not want the Union. Ghanshyam on direct examination confirmed that he had spoke to Tomasco and Leggin in July of 1991 and told them that "we don't want a Union". He added that what was meant by "we" was the four Patel's, but he did not testify that he specifically told either supervisor what he meant by "we", nor on what basis he asserted that the four Patels did not want a Union. On cross-examination Ghanshyam changed his recollection, and asserted that his conversation with Tomasco and Leggin about the Union was before Tomasco became a supervisor, and was to the best of Ghanshyam's recollection in February and March of 1991.

Leggin and Tomasco also testified that during their conversation with Ghanshyam, Ghanshyam suggested that they speak to the other Patels about the matter. Thus, they assert that Gunshyam went with them in the shop to Bhanubha Patel and told Leggin to ask Bhanubhai. Leggin and Tomasco allege that Leggin replied that the employees were supposed to have something to tell him. At that point, Leggin claims that Ghanshyam spoke to Bhanubhai in an Indian dialect, that Leggin did not understand. Then according to Leggin and Tomasco, Bhanubhai told Leggin and Tomasco that he (Bhanubhai), Sudhirnbai, and Thakorbhai did not want the Union.[11]

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10. As noted, none of the Patels are related to one another.

11. As noted however, Ghanshyam on cross-examination indicated that these events took place in February or March of 1991.

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Bhanuhai and Thakorbai both testified that they signed the petitions in 1990, because they did not want to "join the Union". However, they both deny having any conversations with Leggin or any supervisor about the Union.

Sudhirnbai Patel, who did not sign the petition, testified that in July of 1991, Leggin approached him in the cafeteria and asked if he wanted the Union. Sudhirnbai testified that he replied that he did not want the Union. Leggin gave no testimony about a conversation with Sudhirnbai, nor was any memo introdcued of that conversation.

Osuna did write a memo dated July 26, 1991, which asserts that Tomasco was told by Ghanshyam Patel that, quote, "me, Bhanna, Sudi and Thako don't want a Union." The memo further asserts that "this was brought to my attention on July 26th, Friday at 3:30 P.M.

On July 31, Appelgate signed and mailed the charge in the instant case to the Board, which was filed on August 2, 1991, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively with representatives of its employees.[12]

Meanwhile, after receiving the reports from supervisors concerning employee sentiments, plus a copy of the July 1990 petition, Osuna testified that Respondent in early August based on those factors doubted the Union's majority status. Therefore, after consultation with its attorney, Respondent filed an RM Petition in Case No. 22-RM-679 on August 7, with a letter from Shiels dated August 5, setting forth the facts supporting the

12. A copy of this charge was not received by Respondent until August 8.

petition. The following factors were relied upon by Respondent in its letter to support its alleged doubt of the Union's majority status.

Exxel no longer believes that the Steelworkers' Union represents a majority of the collective bargaining unit for the following reasons:

1. Exxel's management has recently learned that, on September 11, 1990 (four days after the Company voluntarily recognized the Steelworkers, eight members of the bargaining unit signed a petition stating that they did not want to be represented by the Steelworkers or by any other union. A copy of the petition is enclosed. This petition was not presented to management until July of 1991.

2. Within the past few days, six members of the bargaining unit have advised management, either directly or indirectly, that they do not wish to be represented by the Steelworkers or by any other union.

3. Neither the September 11, 1990 petition, nor the recent anti-union comments were solicited by management in any way.

4. The bargaining unit at this time, and for the past several months, consists of only thirteen employees. Six of these thirteen[13] employees have recently expressed their desire not to be represented by the union. At least one other employee signed the September 11, 1990 petition.

5. The Company was advised by the Board in September

13. Respondent concedes that this number was incorrect, and that the unit consisted of fourteen employees.

or October of 1990 that the union had refused the Company's offer of voluntary recognition, and the union in fact made no effort to bargain with the Company at any time between September 7, 1990 and July 17, 1991.

Based on the foregoing factors, we seriously doubt that the Steelworkers Union currently represents a majority of the employees in the bargaining unit. We believe that the only way to determine the true wishes of the majority of our employees is to do so through a Board-supervised election.

On or about August 6, Appelgate telephone Osuna. After a discussion about why Appelgate had not returned Osuna's July 18 call, Appelgate informed Osuna that he had filed unfair labor practice charges against Respondent, and Osuna told Appelgate that Respondent was filing a petition with the Board for an election.

The instant complaint was issued on November 27. On December 5, the Region issued an Order Consolidating Case No. 22-RC-10360 and 22-RM-629, and dismissing both petitions because of the issuance of the complaint, but adding that the petitions are subject to reinstatement after disposition of the unfair labor practice case.

III. ANALYSIS

The applicable legal principles necessary to decide the instant matter are succinctly summarized by the Board in Royal Coach Lines 282 NLRB 1037, 1987 enfd. denied on other grounds 838 F2d 47 (2nd Cir.1988).

The Board has consistently held that where, as here, an

employer has validly extended voluntary recognition to a union, the union is entitled to an irrebuttable presumption of majority status until a reasonable time for bargaining has elapsed. Rockwell International Corp., 220 NLRB 1262, 1263 (1975); Keller Plastics Eastern, 157 NLRB 583, 587 (1966). A reasonable time is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions. Brennan's Cadillac, 232 NLRB 255 (1977). Once a reasonable time for bargaining has elapsed, the union enjoys a rebuttable presumption of majority status. This presumption can be rebutted by the employer's showing that at the time of its refusal to bargain, the union did not have majority status in fact, or that the employer had a good-faith doubt of the union's majority status based on objective factors. See generally Bartenders Assn. of Pocatello, 213 NLRB 651 (1974); Cain's Generator Co. 237 NLRB 1198 (1978). Id. at 1038.

Here, there is no dispute that Respondent voluntarily recognized the Union as the collective bargaining representative of its employees on September 7, 1990. The next question to be determined is whether or not a reasonable time for bargaining had elapsed when Respondent withdrew recognition from the Union. However, before resolving that issue, it must be determined when Respondent actually withdrew recognition from the Union

In that regard, General Counsel contends that Respondent withdrew recognition from the Union by virtue of Shiels' response to Appelgate's request for bargaining on May 7, 1991. Respondent disagrees, contending that this conversation did not amount to a withdrawal of recognition, and that recognition was not not withdrawn until August of 1991. I am in agreement

with General Counsel's analysis of Shiels' remark, and find that while Shiels did not use the words withdrawal of recognition in his response, no other reasonable interpretation of his words is warranted. Thus, while he did agree to meet with Appelgate on a "one on one" basis, to discuss what the issues were, Shiels made abolutely clear to Appelgate that he did not wish to meet with the Union's full bargaining committee, and that he would not engage in "formal" negotiations with the Union, unless and until the employees voted in an election. Shiels told Appelgate that he wanted the employees to have an opporunity to pick their bargaining agent, and added that he "felt firmly" about that. Thus, I conclude that the totality of Shiels' remarks amounted effectively to a withdrawal of recognition. Cargill, Inc., d/b/a Paramount Poultry 294 NLRB 867 (1989); Lexington Cartage Company 259 NLRB 55, 56-58 (1981) (Employer attended four negotiation sessions with the Union, and at each one made no counterproposals, and stated that it was the position of the Employer that the Union did not represent a majority of employees, and therefore it was not obligated to bargain with the Union. Held that the Employer withdrew recognition at first meeting that it made the above statements.)

Respondent argues that Shiels never actually foreclosed subsequent bargaining sessions with the Union, and that his request for an initial get acquainted meeting with Appelgate was not unreasonable, nor did it constitute a withdrawal of recognition. I do not agree. In my view, if Shiels' intent as contended by Respondent was to engage in future negotiations with the Union and its full committee after his "get acquainted" meeting with Appelgate, it was incumbent upon him to make that position clear. Not only did Shiels not do so, but his other remarks that he would insist upon an election among

Respondent's employees, notwithstanding its prior recognition of the Union, clearly demonstrates Respondent's position. I conclude that Shiels was obviously unhappy with the decision of his predecessor as chief executive of Respondent, to recognize the Union, and that he did not consider himself bound by that action.[14] Thus Shiels was agreeing to meet with Appelgate as a courtesy to see what the issues were, at the same time he was clearly informing the Union that he did not consider Gould's agreement to recognize the Union binding upon him or Respondent, and that he would require the Union to demonstrate its majority status by winning an election, before commencing actual bargaining. This position amounts to a withdrawal of recognition and I so find.

Having so found, the question of reasonable time for bargaining becomes largely irrelevant, since Respondent does not even argue, as well or it should not based on this record, that it doubted the union's majority on May 7 of 1991, nor that it was aware of any basis for taking such a position. Thus as noted in May of 1991, Respondent was not aware of the petition signed in September of 1990, and had not been informed by any employees about their dissatisfactions with the Union until July of 1991. In such circumstances, Respondent's withdrawal of recognition in May of 1991 prior to its having any doubt of the Union's majority, must be found violative of Section 8(a)(5) of the Act. It is well settled and not disputed by Respondent, that Respondent cannot rely on expressions of anti-union sentiment that came to its attention after the withdrawal of recognition, in order to justify such prior withdrawals of recognition. Manna Pro Partners L.P. 304 NLRB #104 Slip op. p. 2, ALJ slip op. p. 13, (1991); Republic Engraving &

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14. I note that Respondent was not represented by Counsel in May of 1991 when Shiels took this position.

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Designing Co. 236 NLRB 1150, 1156 (1978); Odd Fellow Rebekah Home 233 NLRB 143, 144 (1977).

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on May 7, 1991.

While I need not go any further in my analysis in order to dispose of the instant matter, I do deem it appropriate to make additional alternative findings. Thus, since the question of whether Respondent's conduct in May of 1991 constituted a withdrawal of recognition is not totally free from doubt, I shall analyze the matter further, on the alternative assumption, as argued by Respondent that the withdrawal of recognition did not take place until August of 1991, when Respondent filed its RM petition and formally withdrew recognition from the Union.

However, such an analysis does not preclude assessing whether Respondent's conduct in May and June of 1991, although not amounting to a withdrawal recognition has otherwise violated the Act. In my judgment Respondent's position on meeting with the Union, as expressed by Shiels in May and again in June of 1991, even if not construed as a withdrawal of recognition, does establish a violation of Section 8(a)(1) and (5) of the Act. I note initially that Section 7 of the Act gives employees the right to bargain through representatives of their own choosing. Generally speaking, an employer has no right to dictate to a Union who its representatives may be during bargaining, unless it establishes "a clear and present danger to the collective bargaining process", or that the presence of the objected to party would create ill will and make bargaining impossible. Milwhite Co. 290 NLRB 1150, 1151 (1988), Dilene Answering Service, Inc. 257 NLRB 284, 291

(1981). Here, while Shiels agreed to meet with the Union, he insisted on a one on one meeting with Appelgate, despite Appelgate's protestations that his bargaining committee be present as well. Neither Shiels nor Respondent have asserted that the presence of the Union's bargaining committee presented a clear and present danger to the bargaining process or would create ill will or make bargaining impossible. Thus, Respondent's insistence on meeting only with Appelgate is violative of Section 8(a)(5) of the Act. Dilene supra.

Moreover, Section 8(d) of the Act requires that the Employer "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached." Thus, Respondent does not satisfy its obligations under the Act by merely agreeing to meet with the Union, or to listen to the Union's assertions of "what the issues are or where we are". Respondent must agree to "confer" and to negotiate an agreement with the Union and to execute a written contract incorporating any agreement reached. Respondent cannot simply sit and listen to the Union's proposals, make no counterproposals, all the while insisting that the Union demonstrate its majority status by winning an election, before it engages in "formal" negotiations. Lexington Cartage supra. also See Southern Lumber Co., Inc. 229 NLRB 187, 191 (1986). (Fact that Employer offers to bargain on one condition of employment, layoff procedure, is no defense to a charge of refusing to bargain over other mandatory subjects of bargaining.)

It seems to me that Respondent did not offer to fulfill its obligations to bargain collectively with the Union by Shiels'

imposition of the above described conditions for a meeting, and that the Union was amply justified in refusing to meet in such circumstances. Respondent, as noted, argues that Shiels was merely suggesting an initial get acquainted meeting with Appelgate, and did not foreclose subsequent meetings wherein full bargaining could take place. However, as I have observed above, Shiuels did not give any indication that he contemplated such future meetings and bargaining, and to the contrary insisted on an election before any such bargaining could occur.

Accordingly, based on the foregoing, I make the alternative finding that even if Respondent's position in May and reaffirmed in June is not construed as a withdrawal of recognition, it nonetheless establishes a refusal to meet and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

This brings me to the question of whether a reasonable time for bargaining had elapsed in August of 1991, when Respondent admittedly withdrew recognition from the Union. Respondent argues that a reasonable time had expired by August of 1991, since nearly eleven months had expired since Respondent voluntarily granted recognition to the Union. Citing Tajon, Inc. 269 NLRB 327 (1984), and Brennan's Cadillac 231 NLRB 225 (1977), where the Board found periods of 2 1/2 to four months respectively to be reasonable amounts of time, Respondent contends that the instant case should be treated similarly. Respondent further asserts that the Union was entirely to blame for the failure of the parties to meet and bargain, and that Respondent should not be blamed for the delay. I do not agree.

As noted, the test for determining what is and what is not a

reasonable time is determined by what "transpires during the time period under scrutiny rather than the length of time elapsed." King Soopers, Inc. 295 NLRB 35, 37 (1989). Various factors considered by the Board in making such a determination include whether the parties are bargaining for a first contract; whether the employer engaged in a meaningful good faith negotiations over a substantial period of time; and whether an impasse in negotiations had been reached. Gerrino, Inc. d/b/a Gerrino Restaurant 306 NLRB No. 21 AlJD slip op. p. 7 (June 21, 1991); VIP Limousine 276 NLRB 871, 877 (1985).

Based on the above criteria, it is clear that a reasonable time had not elapsed when Respondent formally withdrew recognition in August, notwithstanding the fact that eleven months had expired since recognition was granted. VIP Limousine supra at 877. The parties were bargaining for a first contract, there was no negotiations over a substantial period of time, and of course no impasse had been reached. Indeed, there was in fact no negotiations at all during this period of time. Gerrino supra at ALJD slip op. p. 8.

Nor do I agree that the blame for the failure of negotiating sessions to have occurred can be attributed solely or even primarily to the Union's dilatory tactics, as Respondent contends. It is true that the Union did cancel the one negotiation session that had been scheduled in September of 1990, and thereafter decided to postpone further efforts to reschedule a meeting, pending resolution of the unfair labor practice charges that it filed concerning Respondent's layoff of employees. However, while this decision of the Union resulted in no attempts to set up a meeting for a period of eight months, since the layoffs involved a substantial number of employees in the unit (over 25%), I do not find it unreasonable for the Union to

postpone bargaining until the charges were resolved and the number of employees in the unit was determined. In any event, Respondent cannot contend that the Union abandoned its interest in the employees, since it was vigorously processing the unfair labor practice charges with the Board. Bio-Medical Applications of New Orleans, Inc. d/b/a Greater New York Orleans Artificial Kidney Center 233 NLRB 1467-1468 (1977), Unoco Apparel, Inc. 215 NLRB 89, 91 (1974).

More significantly, I note that Respondent made no objection to the Union's apparent decision to postpone further bargaining until the resolution of the charges. Respondent made no effort to attempt to schedule another meeting during the period, apparently acquiescing in the Union's desire to resolve the charges first. Indeed, as of November 1990, when Shiels replaced Gould as president, it is obvious from Shiels' own testimony that any attempts to bargain by the Union to meet with Respondent from that time on, would have been met with the same unlawful response made by Shiels in May; i.e. Respondent would meet only with Appelgate, but would not engage in any bargaining unless and until the Union won an election.[15] In such circumstances, Respondent cannot rely on the Union's delay in scheduling bargaining to establish that a reasonable time for bargaining had elapsed. Valley-West Health Care, Inc., d/b/a Driftwood Convalescent Hospital 302 NLRB No. 95 ALJD Slip op. p. 4, 8 (1991).

Moreover, once the Union did make attempts to schedule

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15. In fact, as noted Shiels testified that he believed that these conversations took place in January 1991 shortly after he became president. However, as also noted I have concluded based on other more objective evidence that he was mistaken as to the dates of these conversations with Appelgate, and they occurred on May 7 and June 17.

negotiation sessions in May, June and July, Respondent unlawfully refused to agree to do so, clearly demonstrating that the failure to have bargaining sessions from May to August was primarily attributable to this unlawful conduct of Respondent. In this connection, Respondent relies on the fact that Osuna did attempt to telephone Appelgate in response to the Union's July written request for negotiations, and that due to an error in the Union's transmission of the message, Appelgate did not return the call. However, I place little or no significance upon this error by the Union, since there the record is not clear as to what Osuna intended to say to Appelgate. I note that Respondent adduced no testimony as to the content of the conversation between Shiels and Osuna, when Shiels instructed Osuna to call Appelgate.[16] Thus, there is no basis to conclude that even if Osuna intended to schedule a meeting with Appelgate, that the conditions would have been any different than they were in May and June, when Shiels unlawfully conditioned his agreement to meet, on a meeting with Appelgate alone, with further negotiations to be scheduled only if the Union were successful in the election.

Accordingly, based on the foregoing analysis and authorities, I conclude that a reasonable time for bargaining had not elapsed when Respondent formally withdrew recognition from the Union in August of 1991. Having so concluded, it then becomes unnecessary for me to make any findings on the sufficiency of Respondent's objective considerations for withdrawing recognition since absent a reasonable time for bargaining having elapsed, evidence of employee dissatisfaction with the Union is irrelevant. Valley West supra ALJD slip op p. 9; Gerrino supra. ALJD slip op. p. 9.

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16. Indeed, Shiels did not testify at all about the matter.

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However, since I have been making alternative findings in this decision already, I do deem it appropriate to continue such an approach, and shall analyze further on the assumption that a reasonable time for bargaining had elapsed by August, when recognition was formally withdrawn.

In that event, however, it must be noted that I have also found above, that Respondent's conduct in May and June of refusing to meet and bargain with the Union (even assuming it did not constitute a withdrawal of recognition) was violative of Section 8(a)(1) and (5) of the Act. Such conduct by Respondent which strikes at the heart of the Union's legitimate role as representative of its employees, would likely have contributed to the Union's loss of standing among the unit employees, thereby rendering unreliable any subsequent employee dissatisfaction with the Union. Midway Foodmart, Inc. 293 NLRB 152 fn. 2 (1989). Therefore, the withdrawal of recognition even if construed as having not being effectuated until August, was still tainted by these unremedied unfair labor practices committed by Respondent, and is therefore unlawful. Lee Lumber and Building Material Corp. 306 NLRB No. 29 slip op. p. 3 fn. 15 (February 27, 1992), Bay Area Mack 293 NLRB 125, 131 (1989); Midway Foodmart supra.

So, in sum, I have concluded above that (a) Respondent withdrew recognition from the Union on May 7, when it had no doubt of the Union's majority status; (b) even if it was found that recognition was not withdrawn until August as contended by Respondent, that a reasonable time for bargaining had not elapsed; and (c) even if a reasonable time had elapsed by August, that Respondent's unremedied unfair labor practices tainted its subsequent withdrawal of recognition.

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Thus, only if all three of the above findings are reversed, does it become necessary to evaluate the sufficiency of the objective considerations relied upon by Respondent in withdrawing recognition. Though, I consider such an eventuality unlikely, I shall make such an evaluation, in keeping with my decision to make alternative findings.

Respondent, in its letter signed by Shiels, filed in support of its RM petition, sets forth in substance three reasons as objective considerations which allegedly formed the basis for its doubt that the Union represented a majority of its employees. One of the reasons asserted in that document indicates that Respondent was "advised by the Board in September or October of 1990 that the Union had refused the Company's offer of voluntary recognition, and the Union, in fact, made no effort to bargain at any time between September 7, 1990 and July 17, 1991."

Although this assertion appeared in Respondent's position paper submitted to the Board in connection with the ULP charge and in the instant letter, Connell who testified at the hearing herein, could not recall the Board Agent making this statement to him, but claims that he would not have written it in the position paper had it not been told to him. Particularly, where the Union through Appelgate has credibly denied ever making such a statement to the Board Agent, I find Connell's testimony insufficient to conclude that the Union ever had refused Respondent's offer of voluntary recognition. Moreover, I note that no testimony was adduced from either Shiels or Osuna that in fact Respondent relied upon the alleged refusal to accept recognition by the Union, in concluding that the Union lost its majority status. Indeed, the only testimony in any way related to this issue was Osuna's response that Respondent understood

that the election was postponed as a result of the unfair labor practice charges that had been filed against Respondent. Finally, in my view, Respondent is not entitled to rely upon second hand advice received from Board Agents as to what the Union allegedly told the Agent concerning its recognition desires. Cf Kuna Meat Co. 304 NLRB No. 129 Slip op. p. 2 fn. 2 (1991); and cases cited therein.

Accordingly, I conclude that Respondent cannot place any reliance upon this alleged statement to support its withdrawal of recognition.

Respondent places its principal reliance upon the petition executed by eight bargaining unit employees in September of 1990, stating they do not want to be represented by the Union, but not submitted to Respondent until July of 1991. The petition, which in July of 1991, contained the names of seven bargaining unit employees as of that date, was given to Respondent by supervisor Bill O'Donnell who had prepared and circulated the petition in September of 1990 when he was a unit employee. General Counsel argues that Respondent cannot rely on the petition, because it was received from O'Donnell who was a supervisor at the time he transmitted to Respondent, and that the petition is therefore tainted by O'Donnell's participation in its preparation and circulation. Walker Mfg. Co. 288 NLRB 888 (1988). I do not agree. The critical question to be determined is O'Donnell's status at the time that he became involved in the preparation and circulation of the petition, not the time that he presented it to higher officials of Respondent. Since it is clear that O'Donnel was not a supervisor in September of 1990, and there is no evidence of any supervisory involvement in the petition at that time, I conclude that O'Donnell's mere transmission of the petition to Respondent

in July of 1991, when he was a supervisor, does not taint the petition.[17]

However, I agree with General Counsel's alternative position and citation of authority, that Respondent cannot rely on the petition, because it was executed at a time that no question concerning representation could have been raised. United Supermarkets, Inc. 287 NLRB 119, 120 (1987). Thus, since had the petition been submitted to Respondent in September of 1990 when it was signed, clearly a reasonable time for bargaining would not have expired, and it could not have been considered as a basis to question the Union's majority or withdraw recognition at that time.[18] Royal Coach supra. Thus, since Respondent could not rely on the petition in September of 1990, it cannot subsequently rely on it to justify a more timely withdrawal of recognition in July of 1991. United Supermarkets supra; See also VIP Limousine supra at 878.

Respondent attempts to distinguish United Supermarkets supra on the grounds that the case did not involve a voluntary recognition, but a certification, which Respondent argues "is treated very differently than a case where the one year certification bar applies." However, while there are differences between voluntary recognition and certification in various respects, I do not believe that there is any difference with respect to the principles applicable to the question involved here. Thus,

17. Walker Mfg. supra cited by General Counsel is not to the contrary, as that case deals with well settled principles involving supervisory participation and involvement with a petition at the time that the petition was executed by the employees.

18. It is also noteworthy that the petition contained only eight signatures out of a unit of nineteen employees in September of 1990, less than a majority of employees in the unit.

in Keller Plastics Eastern, Inc., 157 NLRB 583 (1966), the Board held that in a bargaining relationship "established as a result of voluntary recognition of a majority representative, . . . like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain." Id at 587. Thus, the Board treats all types of recognition similarly with respect to the requirement that a "reasonable time to bargain" must be afforded. While in a certification situation, a reasonable time is defined as at least one year, and in other situations the determination is based on a number of factors, there is no difference when it comes to evaluating the quantum of evidence necessary to support an employer's good faith doubt, between a bargaining relationship established by a certification vis a vis other methods such as voluntary recognition.

Therefore, I conclude that Respondent cannot rely on the petition executed in September of 1990 to support its assertion that it reasonably doubted the Union's majority status in July or August of 1991.

That leaves for consideration Respondent's final contention, that it received direct and indirect communications from employees in July of 1991, that they did not wish to be represented by the Union. Since Respondent's own witnesses, as well as its letter supporting the RM petition, indicate that at best six employees expressed their dissatisfaction with the Union, this number constituting less than a majority of the fourteen employees in the unit, would be insufficient to establish a reasonable doubt, even if credited, and even if all of the statements were deemed sufficient to establish a desire not be represented by the Union. Dy-Dee Wash, Inc. 228 NLRB 389, 390 (1977). Therefore, I have concluded that it is unnecessary

to resolve the confusing and often contradictory testimony of Respondent's own witnesses, as to what was said by employees to its supervisors when and by whom concerning union representation.[19]

Moreover, an evaluation of the statements allegedly made to Respondent's supervisors does not permit Respondent to rely on some of the assertions to establish its alleged reasonable doubt of majority status. Thus, Respondent concedes that as to two of the six employees who allegedly expressed their anti-union sentiments, two of them, Sudhirnbai and Thakorbai Patel did so only through the statements of other employees. The Board, supported by the Courts has consistently placed little or no reliance upon statements of employees purporting to represent the views of other employees. Manna Pro Partners, L.P. 304 NLRB No. 104. Slip op p. 4 (1991); Westbrook Bowl 293 NLRB 1000, 1001 (1989); Larsen Supply Co. 289 NLRB 295 (1988); Alexander Linn Hospital Assn. 288 NLRB 103, 109 (1988); Bryan Memorial Hospital v NLRB 814 F2d 1259, 1263 (8th Cir1987), NLRB v Walkill Valley General Hospital 866 F2d. 632, 637 (3rd Cir.1989). Therefore, Respondent cannot rely on the statements of the other Patels (who are not related) to establish the anti-union sentiments of these two employees.[20]

19. For example, Paino testified that Rybski made direct statements to him concerning his dissatisfaction with the Union. Rybski did not recall such a conversation and his pre-trial affidavit specifically denies having such a conversation. The record also contains substantial contradictions concerning the purported conversations with the various Patels which I have described above, which I shall not resolve.

20. The record does reflect according to Sudhirnbai's testimony, that he was approached by Supervisor Leggin in the cafeteria and asked if he wanted the Union. In response to this inquiry, Sudhirnbai testified

(Cont'd)

Accordingly, the best that can be said for Respondent's "objective considerations", comes down to direct statements from only four employees out of a unit of fourteen employees, which indicate dissatisfaction with union representation, which is far from sufficient to establish a reasonable doubt of the Union's majority status.

Therefore, based upon the foregoing analysis and authorities, I find that Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, whether it is found that the withdrawal took place in May as contended by General Counsel and as I have found, or in August as asserted by Respondent.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing on and after May 7, 1991 to meet and bargain with the Union, and by withdrawing recognition from

(Cont'd)

that he responded that he did not want the Union. Respondent cannot rely on this conversation, even if credited to establish its reasonable doubt, since the information emanated from an unlawful interrogation. Hajoca Corp. 291 NLRB 104, 105 (1987) enfd. 872 F2d. 1169, 1176 (3rd Cir.1989). Moreover, since neither Leggin nor any supervisor testified about this alleged conversation, and no memo in Respondent's file referred to it, I conclude that Respondent did not rely on this fact in making its decision to withdraw recognition, and cannot rely on it in this proceeding.

the Union at that time as the exclusive majority representative of its employees in an appropriate unit, Respondent has violated Sectioon 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmation action necessary to effectuate the policies of the Act.

Upon the following findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act. I issue the following recommended:

ORDER[21]

The Respondent, Exxel-Atmos, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

a) Withdrawing recognition from and refusing to meet and bargain collectively with United Steel Workers of America, AFL—CIO, herein called the Union, as the exclusive bargaining

21. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, he adopted by the Board and all objections to them shall be deemed waived for all purposes.

repesentative of its employees in the appropriate bargaining unit set forth below.

b) In any like orrelated manner interfering with or restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a) Upon request, recognize meet and bargain collectively in good faith with the Union as the exclusive collective bargaining representative of its employees in the unit described below, regarding wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody it in a signed contract. The appropriate unit is:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by Respondent at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Somerset, New Jersey copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 22, after

---

22. If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to Emloyeesare customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: Washington, D.C. July 23, 1992

Steven B. Fish
Administrative Law Judge

Appendix G

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from or refuse to meet and bargain collectively with United Steel Workers of America, AFL—CIO, herein called the Union, as the exclusive bargaining representative of our employees in the appropriate bargaining unit set forth below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL upon request, recognize, meet and bargain collectively in good faith with the Union as the exclusive collective bargaining representative of our employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and if an agreement is reached, embody it in a signed contract. The appropriate unit is:

All full-time and regular part-time production and maintenance empployees, quality control employees, laboratory

technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professicnal employees, sales employees, guards and supervisors as defined in the Act.

Exxel-Atmos, Inc.

National Labor Relations Board (N.L.R.B.)

309 NLRB 1024, 309 NLRB No. 165, 1992 WL 390103 (N.L.R.B.), 143 L.R.R.M. (BNA) 1042, 1992-93 NLRB Dec. P 17,677

END OF DOCUMENT

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FILED AUGUST 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1997 **No. 97-1417**

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America ,

Intervenor

Consolidated with 97-1418

BEFORE: Wald, Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed July 30, 1998, it is **ORDERED** that the petition be denied.

Per Curiam

Appendix H

FOR THE COURT:
Mark J. Langer, Clerk
By: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX I — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FILED AUGUST 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1997 **No. 97-1417**

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America ,

Intervenor

Consolidated with 97-1418

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

Appendix I

ORDER

Upon consideration of peitioner's Suggestion for Rehearing *In Banc,* and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX J — LETTER TO MARK J. LANGER FROM JOHN D. BURGOYNE AND ATTACHED JUDGMENT, DATED AUGUST 21, 1998

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 21, 1998

Mark J. Langer, Esquire
Clerk, United States Court of Appeals
for the District of Columbia Circuit
3rd & Constitution Avenue, N.W.
Room 5419
Washington, D.C. 20001-2866

Re: Nos. 97-1417 & 97-1418,
Exxel/Atmos, Inc. v. NLRB
(D.C. Cir.)
Board Case No. 22-CA-20475

Dear Mr. Langer:

As directed by the Court's order of August 14, 1998, please find enclosed an original and four copies of the Board's proposed judgment, with the Court's modifications in the above-entitled matter.

Very truly yours,
s/ John D. Burgoyne
John D. Burgoyne
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

Appendix J

cc: Francis A. Mastro
Apruzzese, McDermott
Mastro & Murphy
P.O. Box 112
Liberty Corner, NJ 07938

Daniel M. Kovalik, Esq.
Assistant General Counsel
United Steelworkers of America, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, PA 15222

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos.97-1417, 97-1418

EXXEL/ATMOS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED STEELWORKERS OF AMERICA,

Intervenor.

JUDGMENT

Before: WALD, SENTELLE, and RANDOLPH, Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by Exxel/Atmos, Inc., to review an order of the National. Labor Relations Board in Board Case No. 22-CA-20475, issued on June 5, 1997, and Upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on April 9, 1998, and has considered the briefs and transcript of record filed in this cause. On June 26, 1998, the Court, being fully advised of the premises,

handed down its opinion granting in part and denying in part enforcement of the Board's Order. in conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Exxel/Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain with United Steelworkers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by the Company at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and, on request bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement roached in a written contract.

(b) Within 14 days after service by the Region, post at its facility in Someset, New Jersey, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided

by the Regional Director for Region 22 of the National Labor Relations Board (Newark, New Jersey), after being signed by the company's authorized representative, shall be posted hy the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material, In the event that, during the pendency these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed hy the Company at any time since December 7, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided hy the Region attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the parties shall bear their own costs,

_____
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

_____
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

_____
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

Appendix J

APPENDIX

NOTICE TO EMPLOYEES
POSTED PURSUANT TO A JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities

WE WILL NOT refuse to bargain with United Steelworkers of America, AFL—CIO as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, quality control employees,

laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, state employees, guards and supervisors as defined in the Act.

WE WILL, on request, recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

EXXEL-ATMOS, INC.

APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JUNE 26, 1998

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1417

September Term, 1997

UNITED STATES COURT APPEALS

FOR DISTRICT OF COLUMBIA CIRCUIT

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America,

Intervenor,

Consolidated with 97-1418

It Is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41 (a). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Appendix K

FOR THE COURT:

Mark J. Langer, Clerk
BY: s/ Eva Brown
Eva Brown
Deputy Clerk

APPENDIX L — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FILED SEPTMEBER 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1998 **No. 97-1417**

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America,

Intervenor

Consolidated with 97-1418

BEFORE: Wald, Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of petitioner's motion for stay of mandate, the responses thereto and of the reply, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate through October 1, 1998.

Appendix L

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX M — LETTER TO ANDREW J. CHARNICK, JR. FROM FRANCIS J. CONNELL III DATED JANUARY 10, 1998

DRINKER BIDDLE & REATH
PHILADELPHIA NATIONAL BANK BUILDING
BROAD AND CHESNUT STREETS
PHILADELPHIA, PA 19107
TELEPHONE: (215) 985-2700
TELEX: 834684
FAX: (215) 288-2757

January 10, 1995

Via Telecopier

Mr. Andrew J. Charnick
Staff Representative
United Steelworker's of America (AFL-CIO)
District No. 8
311 Route 156
Yardville, NJ 08620

Dear Mr. Charnick:

I represent Exxel/Atmos, Inc., and I write this letter on its behalf.

Exxel/Atmos has just learned that a number of employees have submitted a request to the National Labor Relations Board for a decertification election. The Company believes that the decertification effort is supported by a majority of the current workforce. In view of this development, Exxel/Atmos believes that it would be prudent to delay the beginning of negotiations

with the USWA pending clarification of the status of the decertification effort. Therefore, the Company's representatives will not meet with you tomorrow, as scheduled.

When we have obtained clarification of the situation regarding the pending decertification effort from the NLRB, we will contact you.

Do not hesitate to contact me, or to have your attorney contact me, if you have any questions about this.

Very truly yours,
s/ Francis J. Connell III
Francis J. Connell III

FJCIII/sd

APPENDIX N — LETTER TO REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD FROM FRANCIS J. CONNELL III DATED JANUARY 10, 1998

DRINKER BIDDLE & REATH
PHILADELPHIA NATIONAL BANK BUILDING
BROAD AND CHESNUT STREETS
PHILADELPHIA, PA 19107
TELEPHONE: (215) 985-2700
TELEX: 834684
FAX: (215) 288-2757

January 10, 1995

Via Telefacsimile & First Class Mail

Regional Director
National Labor Relations Board, Region 22
970 Broad Street Room 1600
Newark, New Jersey 07102-2570

Re: Exxel/Atmos, Inc.
Case No. 22-CA-17899

Dear Sir:

I represent Exxel/Atmos, Inc. ("Exxcel"), which is the respondent in Case No. 22-CA-17889. On November 14, 1994, the United States Court of Appeals for the District of Columbia circuit issued a judgment requiring, in part, that Exxel cease and desist from withdrawing recognition from and refusing to bargain collectively with the United Steel Workers of America ("USWA").

Appendix N

In compliance with the Court of Appeal's judgment, Exxell had scheduled an initial meeting for purposes of collective bargaining with the USWA for tomorrow afternoon. However, Exxewl has just learned that a number of bargaining unit members have filed a petition with your office to decertify the USWA. Therfore, Exxel has notified the USWA that it desires to delay the beginning of negotiations until the status of this decertification effor can be clarified.

I would greatly appreciate your contacting me as soon as possible to advise me of the status of any decertification petition which has been filed by employees of Exxel. Also, if a decertification petition has been filed, I request that you advise me, as Exxel's attorney, whether the petition has been signed by at least 50% of the current bargbaining unit, which currently consists of 23 employees.

Please feel free to call me at (215) 988-2926 to discuss matter.

Respectfully yours,

s/ Francis J. Connell III
Francis J. Connell III

FJCIII/lkb

cc: Mr. Ronald Lemke (Exxel/Atmos, Inc.) (via telefacsimile)
Mr. Andrew J. Charnick, Jr. (United Steelworkers of America) (via telefacsimile)
Mr. Edward Peterson (NLRB) (via telefacsimile)

APPENDIX O — LETTER FROM THE NATIONAL LABOR RELATIONS BOARD TO JAY SONI, DATED JANUARY 13, 1995

United States Government

NATIONAL LABOR RELATIONS BOARD
Region 22
370 Broad Steet - Room 1600
Newark, NJ 07102-2570

January 13, 1995

Jay Soni
315 Pegasus Road
Piscataway, New Jersey 08854

Re: Excell/Atmos

Dear Mr. Soni:

Your mailing was received in this office on January 11, 1995. Based on the materials you submitted, you may desire to file a formal decertification petition. Please call the undersigned at (201) 645-3492, or visit the Information Officer at the above address between the hours of 8:45 a.m. to 5:15 p.m. Time may be critical in the handling of this matter. Please call or visit the Information Officer as soon as possible.

Very truly yours,

s/ Susan D. Schwartz
Susan D. Schwartz
Board Agent

APPENDIX P — NOTICE OF REFUSAL TO JOIN UNION, DATED JANUARY 3, 1995

Date: 1/3/95

Board of Directors
National Labor Relations Board
Region 22
970 Broad Street, Room 1600
Newark, NJ 07102-2570
(201) 645-2100

Dear Sirs/Madams:

My name is Jay R. Soni and I am currently employed with Exxel Atmos Container Inc. which is located at 33 Schoolhouse Road, Sommerset, NJ, 08873. I have read the current proposal to join the union. After due consideration, I have concluded that I do not wish to join the union at this time.

Sincerely,
s/ [illegible]

cc: Labor Board
Exxel/Atmos

APPENDIX Q — PETITION OF THE NATIONAL LABOR RELATIONS BOARD, DATED JANUARY 26, 1995

FORM NLRB-502

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE

Case No. 22-RD-1136

Date Filed 1/26/95

* * *

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section B(b)(7) of the Act has been filed involving the employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

* * *

XX RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

* * *

2. Name of Employer *Exxel/Atmos, Inc.*
Employer Representative to contact *Ron Lumke, President*
Telephone Number *908-560-3655*

Appendix Q

3. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code) *33 Schoolhouse Road, Somerset, NJ 08873*

4a. Type of Establishment (Factory, mine, wholesaler, etc.) *Factory*

4b. Identify principal product or service *Plastic containers*

* * *

6a. No of Employees in Unit: Present *28*

* * *

8. Name of recognized or Certified Bargaining Agent (if none, so state) *United Steelworkers of America, AFL-CIO*

Affiliation *AFL-CIO*

Address and Telephone Number *311 Route 156, Yardville, NJ 08620*

* * *

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name of Petitioner and Affirmation, if any Jay R. Soni, An individual

By s/ Jay R. Soni 1/26/95
Signature of Representative or person filing petition

Appendix Q

Title *An individual An individual*

Address *315 Pegasus Rd., Piscataway, NJ 08854*

Telephone *908-985-3135*

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

APPENDIX R — LETTER TO SUSAN D. SCHWARTZ, BOARD AGENT FOR THE NATIONAL LABOR RELATIONS BOARD FROM FRANCIS J. CONNELL III DATED JANUARY 30, 1995

1345 CHESNUT STREET
PHILADELPHIA, PA 19107-3496
TELEPHONE: (215) 985-2700
TELEX: 834684
FAX: (215) 988-2757

January 30, 1995

Via Fax and Certified Mail

Ms. Susan D. Schwartz
Board Agent
National Labor Relations Board
Region 22
970 Broad Street — Room 1600
Newark, NJ 07102-2570

Re: Exxel/Atmos, Inc. — Case No. 22-CA-17889

Dear Ms. Schwartz:

I am writing to confirm the conversations we have had during the past two weeks (most recently on January 25) regarding the inconsistency between the Notice which the Board has asked Exxel/Atmos, Inc., ("Exxel") to post in its plant, and Exxel's actual obligations under the cease and desist order which the Court of Appeals has enforced.

There is no question that the order which the Court of Appeals has enforced is a cease and desist order. The Board has stated in documents filed with the Court of Appeals is this

case that, under the cease and desist order, the employees may seek to decertify the Union at any time after issuance of the order, and the employer may similarly withdraw recognition and refuse to bargain with the union based upon a good faith doubt regarding the Union's continuing majority status. For example, in its opposition to Exxel's Motion to Strike the Board's. Proposed judgment, in Board stated as follows:

> The effect of [the cease and desist order], as the Court interprets it, will be to require the Company to bargain with the Union and, if agreement is reached, to sign the collective bargaining agreement. The Order, however, will not bar the employees from seeking to decertify the Union at any time after the resumption of bargaining nor prevent the Board from, processing such a decertification request. (Slip Op. 7-11).

(Opposition of NLRB to Exxel's Motion to Strike Proposed Judgment at ¶ 5). The Board reaffirmed its position in its petition for Rehearing, in which it stated:

> . . The limited bargaining order that the panel assumes is appropriate (Slip Op. 9) — namely, a cease and desist order that is instantly terminable at the option of disaffected employees (or the employer acting on their behalf). . . .

(Board's Petition for Rehearing at 10).

Exxel agrees with the Board that, under the cease and desist order, the employees may petition the Board for decertification and Exxel may withdraw recognition and refuse to bargain so long as its actions are based on a good faith doubt about the union's continuing majority status.

Appendix R

As I stated in my letter to the Regional Director dated January 10, 1995 and in my letter to you dated January 18, 1995, Exxel has learned that 12 of the 23 members of the bargaining unit have signed statements that they do not wish to be represented by the union. Exxel has now been notified by the Board that a formal decertification petition has been filed. Based upon these employee statements and the decertification petition in Case No. 22-RD-1136, Exxel has a good faith doubt about the union's continuing majority status and, therefore, I have advised Exxel that it is not required to bargain with the union until the union's majority status has been clarified, either through a decertification election or otherwise.

The situation in which Exxel now finds itself is neither practically correct nor consistent with the Court of Appeals' decision. Exxel has no current duty to bargain with the Union, and cannot do so because of the 'employees' expression of their desire to be rid of the union and the pending decertification election. Exxel has advised both the union and the Board that it will not bargain with the union under these circumstances. Yet, the Company has posted the Board's Notice, pursuant to the Court's order, which says it will not refuse to bargain with the union. This problem is underscored by the fact that the Board has now directed Exxel to post its standard Notice to Employees regarding the decertification petition. I have advised Exxel to post that Notice in the same place where the Notice regarding the Company's obligations under the cease and desist order is posted. This situation makes no sense, and something should be done to eliminate this confusion.

This will confirm specifically that I have advised you on several occasions that, while Exxel (on my advice) has posted the Board's Notice as the Court of Appeals has ordered, the posting of this Notice is not intended to compromise in any

way Exxel's position that it currently has no obligation to recognize or bargain with the union owing to the fact that Exxel has a good faith doubt as to the union's Continuing majority status. I also wish to confirm that I have suggested that the Board amend the notice so as to accurately state Exxel's obligation under the Court of Appeals' decision — i.e., to state that Exxel's obligation to recognize and bargain with the union is subject to the condition that Exxel will have no such obligation if the union is decertified, or if Exxel has a good faith doubt as to the union's continuing majority status. You advised me on January 25 that the Board will not amend the language of the Notice. You also suggested that Exxel consider filing a motion with the Court of Appeals asking the Court to amend the language of the Notice.

I hereby renew Exxel's request that the Board amend the Notice in the manner suggested above, so as to more accurately state Exxel's obligations. I also request that the Board confirm that Exxel has no duty to bargain with the union while the decertification petition is pending.

Finally, on behalf of Exxel, I advise you that the bargaining unit currently consists of 23 employees, and request that the Board notify Exxel promptly whether the pending decertification petition in Case No. 22-RD-1136 has been signed by a majority of the bargaining unit.

I request that the Board respond in writing to the foregoing requests.

Please do not hesitate to call if you wish to discuss this with me.

Appendix R

Very truly yours,
s/ Francis J. Connell III
Francis J. Connell III

FJCIII

cc: Mr. Andrew Charnick
United Steelworkers of America

APPENDIX S — LETTER FROM THE NATIONAL LABOR RELATIONS BOARD TO FRANCIS J. CONNELL, III, DATED FEBRUARY 2, 1995

NATIONAL LABOR RELATIONS BOARD
Region 22
970 Broad Street - Room 1600
Newark, NJ 07102-2570

February 2, 1995

Francis J. Connell, III
Drinker, Biddle & Reath
1345 Chestnut Street
Philadelphia, Pennsylvania 19107-3496

Re: *Exxel-Amos, Inc.*

Dear Mr. Connell:

I am writing to respond to the issues you raised in your letter of January 30, 1995 regarding the above-captioned matter.

Please be advised that the procedure for modification of notice language is set forth in Section 10521.1 of the Compliance Casehandling Manual. In summary, absent an agreement between the parties to change the notice language, the Regional Director has no authority to modify the notice language, and any party seeking a modification must file a motion with the Board.

In regard to the Respondent's obligations under the Court Judgment which my be impacted by the decertification petition filed in Case 22-RD-1136, the Employer acts at its own risk. The Region cannot respond to your request for its position on

compliance with the pending unfair labor practice case until the completion of the investigation of the petition.

In response to your request for the Region to disclose whether the decertification petition is supported by a majority of employees, please be advised that at this time, the policy prohibiting such disclosure remains unchanged. Accordingly, your request is declined at this time.

Very truly Yours,

s/ Susan D. Schwartz
Susan D. Schwartz
Board Agent

APPENDIX T — ORAL ARGUMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED APRIL 9, 1998

ORAL ARGUMENT: APRIL 9, 1998

Nos. 97-1417, 97-1418

UNITED STATES COURT OF APPEAL
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EXXEL/ATMOS, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC

Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

Appendix T

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* * *

B. The Board Reasonably Issued an Affirmative Bargaining Order in *Exxel/Atmos II*

This Court has already enforced the Board's cease-and-desist order in *Exxel/Atmos I.* The only remaining issue is whether the Board's affirmative bargaining order should also be enforced. As the Court noted in *Exxel/Atmos I,* (A 16), both orders require bargaining, but only the affirmative bargaining order precludes the 'filing of a decertification petition for a reasonable time. *Accord Caterair,* 22 F.3d at 1123.

In addition to reaffirming its prior issuance of an affirmative bargaining order in *Exxel/Atmos I,* (A 33-35), the Board issued such an order in *Exxel/Atmos II.* (A 29, par. 2(a)). Since the two bargaining orders are essentially identical (compare A 29, par. 2(a), with A 55, par. 2(a)), enforcement of the order in *Exxel/Atmos II* would render it unnecessary to rule

on the propriety, of the order in *Exxel/Atmos I.*

In *Caterair*, 22 F.3d at 1123, this Court described a cease and-desist order, with no decertification bar, as a "sound third option" to a new election or an affirmative bargaining order with a decertification bar. The facts of *Exxel/Atmos II* belie this description. Although the Court said in both its opinion, (A 16), and its judgment, (A 20), in *Exxel/Atmos I,* that a cease and-desist order requires bargaining, its enforcement of the cease-and-desist order did not result in any bargaining. Instead, as shown above, pp. 25-28, the Company instigated a decertification petition and then relied on that petition to cancel the very first scheduled bargaining session and refuse to consider holding another. It attempted to decide for itself the question left for the Board on remand: whether an immediate decertification petition should be allowed.

In *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944), the Supreme court, in upholding the Board's issuance of a bargaining order despite the union's loss of majority support after the employer's unlawful refusal to bargain, observed:

> The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation.

The Company is exactly the sort of "recalcitrant employer" to which the Court was referring. Its position in 1995, (A 85),

was virtually identical to its position in 1991, (A 15, 47-48): it would not bargain without an election, even though this Court had squarely held in the interim, (A 16), that the Board was not required to conduct one. Thus, although the Company's top management has changed since 1991, (A 63), its attitude toward collective bargaining has not. *Cf. Amazing Stores, Inc. v. NLRB,* 887 F.2d 328, 331 (D.C. Cir. 1989) (likelihood of employer's repetition of unlawful conduct relevant in determining whether to issue a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969)).

The Company's attempt, (Br 91 14, 23-26, 37, 42), to portray itself as a champion of its employees' rights should receive short shrift. A unanimous Supreme Court disposed of a similar claim in *Brooks v. NLRB,* 348 U.S. 96, 103 (1954): "The underlying purpose of [the Act] is industrial peace. To allow employers to rely an employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." The Supreme Court repeated these views, again unanimously, in *Auciello Iron Works, Inc. v. NLRB,* 116 S.Ct. 1754, 1760 (1996).

If, contrary to our contention, the court-enforced cease-and-desist order in *Exxel/Atmos I* meant what the Company treated it as meaning — that the Company was free to withdraw recognition immediately upon the filing of a decertification petition, without having bargained for one day, much less the four months remaining in the initial year of recognition, and without waiting for the Board to exercise its discretion to accept the petition or reject it as premature — the "third option" advocated in *Caterair* would be a sham, for in reality, the Board would have no alternative but to conduct an election. This Court has already held that the Board need not conduct an election, for to do so "would grant the Company an option to which it

was not entitled when it committed the unfair labor practice." (A 16.) The Company is still not entitled to that option. Its response to the Court's prior decision shows that there is only one way to make this clear: by enforcing the Board's affirmative bargaining order.

C. An Affirmative Bargaining Order Is An Appropriate Exercise of the Board's Remedial Discretion

In remanding *Exxel/Atmos I,* this court stressed that "'we harbor no disagreement with the Board's policy choices. We ask only for a clear statement of what those choices and the reasons for them are.'" (A 17; citation omitted.) In its decision on remand in *Caterair (Caterair International,* 322 NLRB 64 (1996)) and in its decision in *Lee Lumber,* both of which the Board cited in reaffirming its issuance of an affirmative bargaining order in *Exxel/Atmos I,* (A 33-34, 35 n.8), the Board provided such a clear statement.[9] In particular it addressed this Court's suggestions that the decertification bar that accompanies an affirmative bargaining order is an unwarranted intrusion on employee rights. *See Williams Enterprises v. NLRB,* 956 F.2d 1226, 1237 (D.C. Cir. 1992); *Caterair,* 22 F.3d at 1122; *Exxel/Atmos I,* 28 F.3d at 1248. (A 16.) In doing so, the Board explicitly engaged in a balancing of competing interests. *Caterair,* 322 NLRB at 66-68; *Lee Lumber,*

* * *

9. As the Board pointed out in Caterair, 322 NLRB at 65 & n.4 68, its rationale there closely tracks that of its earlier decision in Williams Enterprises, 312 NLRB 937, 940-942 (1993), on remand in Williams Enterprises, 312 NLRB 937, 940-942 (1993), on remand from 956 F.2d 1226 (D.C. Cir. 1992). The Fourth Circuit expressly approved the Board's reasoning in that case. See NLRB v. Williams Enterprises, Inc., 50 F.3d 1280, 1289-1290 (4th Cir. 1995).